157-241

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 880.

THE MEXICAN NATIONAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DAVIDSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 5, 1895.

(15,764.)

JANUARY 21, 1895.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 21, 1895.

1 United States Circuit Court of Appeals for the Second Circuit.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

THE MEXICAN NATIONAL RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH A. DAVIDSON, Defendant in Error.

This is a writ of error taken out by the defendant below, The Mexican National Railroad Company, to review a judgment rendered against defendant and in favor of plaintiff in the circuit court for the eastern district of New York on November 24, 1893, for $151,832.41, after a trial before the court without a jury, the jury having been waived.

The case coming on to be heard before this court at the October term on December 10, 1894, the following facts appeared from the transcript of record herein:

Statement of Facts.

The plaintiff Davidson, who is and at the commencement
2 of the suit was a citizen of New York and resident of the eastern district thereof, began this action on September 11, 1891, in the supreme court of the State of New York against the defendant, The Mexican National Railroad Company, a corporation created under the laws of the State of Colorado and a citizen thereof and not a resident of said eastern district of New York. An attachment was issued on September 11, 1891, complaint was served on October 8, 1891, and on the 28th of October, 1891, the cause was removed by the defendant into the United States circuit court for the eastern district of New York.

The action duly progressed according to the practice of the court, resulting in the judgment above set forth.

The plaintiff claimed under an assignment made to him on September 11, 1891, by the Mexican National Construction Company, a corporation created by the laws of the State of Colorado and a citizen of that State. He sought to recover upon two causes of action:

1st. To recover, with interest from 15th of October, 1886, the amount of a debt owing the construction company by the Mexican National Railway Company on 15th October, 1886, which the defendant, in consideration of the transfer to it of certain railroad property, agreed to pay with other debts up to the extent of a certain fund which was put into its hands and which was sufficient in amount for that purpose. The other debts had been fully paid before suit brought.

3 2nd. To recover $1,731 damages sustained by the construction company (being its payment of the reasonable fees of an umpire and stenographer) through the breach by the defendant of an agreement between it and *upon* the construction company

to adjust by arbitration the controversy over the claim first mentioned.

The complaint and the exhibits which were attached thereto and made a part thereof and the answer are annexed hereto and marked "Appendix A."

The citizenship of the parties and of the Mexican National Construction Company is set forth in the affidavits upon which an attachment was granted and in the complaint.

Among the assignments of error duly filed by the defendant below on May 21, 1894, appear the following:

"XCV. That the court upon the trial entertained jurisdiction of this cause.

"XCVI. That the court upon the trial entertained jurisdiction of the first alleged cause of action set forth in the complaint.

"XCVII. That the court upon the trial entertained jurisdiction of the second alleged cause of action set forth in the complaint."

Among the findings of fact and conclusions of law proposed by the defendant below upon the submission of the case to the
4 circuit court there appear no requests to dismiss the case for lack of jurisdiction, and the twelfth conclusion of law proposed by the defendant is as follows:

"12th. The defendant is entitled to recover from the plaintiff the sum of $— with interest from the — day of ——, 18—."

The record shows that no question as to the jurisdiction of the circuit court was raised upon the trial, and no such question is referred to in the findings or opinion of the circuit court.

And now on the foregoing statement of facts this court certifies to the United States Supreme Court for decision thereon, pursuant to section 6 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, the following questions or propositions of law concerning which it desires the instruction of that court for its proper decision:

Questions Certified.

"First. Whether or not the United States circuit court of the eastern district of New York had jurisdiction to hear and determine the first cause of action.

"Second. Whether or not the United States circuit court of the eastern district of New York had jurisdiction to hear and determine the second cause of action."

5 And this court further certifies that it has suspended any decision on the merits of the said writ of error until the hearing and determination of the questions of jurisdiction hereby certified to the United States Supreme Court.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
N. SHIPMAN, *Circuit Judge.*

6 APPENDIX A.

Supreme Court of the State of New York.

JOSEPH A. DAVIDSON, Plaintiff, *against* THE MEXICAN NATIONAL RAILROAD COMPANY, Defendant.	Complaint. Trial Desired in the County of Kings.

The plaintiff, by Parsons, Shepard & Ogden, his attorneys, complains of the defendant and alleges upon information and belief:

For a First Cause of Action.

I. The plaintiff is a citizen and resident of the United States of America and of the State of New York, and upwards of the age of twenty-one years.

The defendant is a railroad corporation created by and existing under the laws of the State of Colorado and owning and operating as its principal property the railroad within the Republic of Mexico which is hereinafter called the Mexican National railroad.

II. The Mexican National Construction Company (hereinafter called the construction company) is and has been since on or about the 1st day of September, 1880, a corporation duly organized and existing under the laws of the State of Colorado. It was so organized for the purpose of building, owning and operating railroads within the Republic of Mexico, and among other railroads the said Mexican National railroad; and ever since its said organization it has
7 been authorized by the said laws under which it was so incorporated and also by the laws of the Republic of Mexico, to, and the said laws provided that it might construct, equip, operate, maintain or own railroads within the Republic of Mexico and make contracts for the construction, equipment, operation, maintenance or ownership of such railroads, and do any and every act necessary or proper to such construction, equipment, operation, maintenance or ownership.

III. The Mexican National Railway Company (hereinafter called the railway company) from a time prior to the year 1881, until a time after the first day of January, 1888, was a corporation duly organized and existing under the laws of the State of Colorado, by which laws and also by the laws of the Republic of Mexico it was authorized to, and the said laws provided that it might construct, equip, operate, maintain or own a railroad or railroads within the Republic of Mexico, and especially the railroad now known as the Mexican National railroad. The Mexican National railroad was constructed by the construction company for and upon the employment of the railway company and long prior to the 15th day of October, 188–, was delivered to the railway company by the construction company; and on the 15th day of October, 1886, the railway company was the owner and in the possession of, and was operating

the railroad now known as the Mexican National railroad. The said railroad included a main line running from the city of Mexico to Nuevo Laredo, all within the Republic of Mexico (except that the portion of the same between San Miguel and Saltillo, two points upon the said line, was not entirely finished and in operation), and included besides certain outlying branches; and there are and have at all times been appurtenant thereto equipment, rolling stock, telegraph and telephone lines and other usual appurtenances of railroads. The term Mexican National railroad as hereinafter
8 used will include not only the said main line and outlying branches, but also the said equipment, rolling stock, telegraph and telephone lines and other usual appurtenances, but not including the portions of railroad reserved to the construction company by the Matheson-Palmer agreement hereinafter mentioned. The construction company prior to the 15th day of October, 1886, had in the course of such construction and equipment of the Mexican National railroad performed work, labor and services, and furnished materials for the said railroad and for the railway company. Upon account of such work, labor, services and materials, the railway company prior to the 15th day of October, 1886, had paid to the construction company large sums of money, and on the 15th day of October, 1886, there remained over and above such sums unpaid of the reasonable price and value of the said work, labor, services and materials the sum of one hundred and four thousand two hundred and forty-four and $\frac{10}{100}$ths dollars ($104,244.10), and on that day there was owing and unpaid by the railway company to the construction company for such work, labor, services and materials the said sum of $104,244.10, and also interest thereon amounting on that day to the sum of seven thousand two hundred and ten dollars and eighteen cents ($7,210.18) being together the sum of one hundred and eleven thousand four hundred and fifty-four dollars and twenty-eight cents ($111,454.28).

IV. Prior to the 15th day of October, 1886, the railway company had made, issued and duly and for value negotiated and disposed of certain six per cent. gold bonds to the amount of several millions of dollars, and had secured the same by a first mortgage upon the Mexican National railroad. The laws of Colorado and Mexico authorized such issuance and sale of bonds, and the making of such
9 mortgage, and provided that the same might be issued, sold and made. Prior also to the 15th of October, 1886, the railway company had defaulted in the payment of interest upon its bonds, and there was danger that the mortgage would be foreclosed, and the railway company was also involved in other pecuniary difficulties and embarrassments. The construction company was the owner of a large amount in the said bonds of the railway company, and also owned a large part of the stock of the railway company. The construction company was also the owner of a large amount of rolling stock, equipment, materials and supplies originally intended for use upon the said railroad or upon branches thereof, or upon roads connecting or intended to connect therewith, and without the use of some or all of which the railroad

would be seriously crippled. The construction company was also the owner of a subsidy of several millions of dollars theretofore granted by the Mexican government, upon which payment had from time to time been made, and upon which, from time to time thereafter, payments were to be made; and the construction company had other rights and interests as mentioned or referred to in the Matheson-Palmer agreement, hereinafter mentioned.

In respect to the making of the Matheson-Palmer agreement, hereinafter mentioned, and the matters therein mentioned, Messrs. Matheson & Co., of No. 3 Lombard street, London, England, on and prior to 15th October, 1886, represented certain holders of said bonds of the railway company, and General William J. Palmer, of the city of New York, represented the railway company, the construction company and certain other holders of bonds of the railway company. Thereupon, in order to preserve to the utmost the interests of all bondholders and stockholders of and all others interested in the railway company or its securities, and to preserve the railroad property then belonging to the railway company, the said agreement was, on or about the 15th day of October,
10 1886, made between the said Matheson & Co. and the said William J. Palmer in their respective capacities as aforesaid, which agreement bore date on that day and is in the form in which a copy is annexed to this complaint as part hereof, entitled "Matheson-Palmer agreement." All the matters recited in the said agreement are true; and since the making thereof the said agreement has been as to its principal features (but not with reference to the sum of $217,000 hereinafter mentioned) carried out. On or before the 16th day of November, 1886, the agreement was duly ratified by all the parties mentioned in the nineteenth article thereof. As part of the consideration to the construction company for making the said agreement was the promise and undertaking that provision for payment of the debts of the railway company should be made as therein provided.

V. In pursuance of the Matheson-Palmer agreement, the parties thereto procured the defendant to be duly incorporated as the "new railway company" proposed and mentioned in the said agreement, and the defendant was by such procurement, and in large part by the procurement of the construction company, duly incorporated as aforesaid under the laws of Colorado on or about the 5th day of February, 1887. The defendant was so incorporated solely under and by reason of and to carry out the said agreement.

VI. The defendant having been so incorporated, desired to acquire the Mexican National railroad as provided in the Matheson-Palmer agreement, and was unable to acquire the same except under and pursuant to the Matheson-Palmer agreement and by adopting and becoming a party to the said agreement. In pursuance to such agreement and in consideration thereof and after the defendant's incorporation as aforesaid, the construction company promoted and consented to proceedings to foreclose the mortgage made by
11 the railway company as aforesaid; and in large part upon such procurement and with such consent, proceedings were,

in the months of February, March, April and May, 1887, conducted in the courts of the Republic of Mexico, and under the direction of officials thereof, so that on or about the 24th day of May, 1887, a conveyance of the Mexican National railroad was, by officials appointed by the courts of Mexico and by the construction company, executed and delivered to the defendant, and thereafter under and by virtue of such conveyance, the defendant entered into and has since remained in the possession and ownership of, and has since operated and is now operating and does now own the said railroad. The conveyance of said railroad was delivered by the construction company, and was accepted by the defendant solely in consideration of and in partial execution of the terms of the Matheson-Palmer agreement; and in further execution of that agreement and solely by reason of and in execution of its terms, the construction company assigned to the defendant company, and the defendant company accepted rolling stock and equipment mentioned in the first subdivision of the eighth article of the said agreement, and the construction company transferred to the defendant and the defendant accepted materials and supplies mentioned in the second subdivision of the eighth article of the said agreement, and the construction company executed for and with the railway company a pledge of the seven million dollars subsidy mentioned in the third subdivision of the said eighth article.

VII. The defendant having thus, in pursuance of the Matheson-Palmer agreement, become the owner and in possession of the Mexican National railroad, did, in further pursuance of the said agreement and on or about the 1st day of June, 1887, execute and deliver to Hugh M. Matheson and Charles Magniac, as trustees, a certain mortgage or trust deed for the security of the first-mortgage
12 bonds of the "New Company," being the defendant, as mentioned in the fifth article of the said agreement. Since the execution of the said mortgage the defendant, in further pursuance of the Matheson-Palmer agreement, and especially of the fifth article thereof, has issued $12,500,000 in par value of principal of first-mortgage gold bonds, which bonds became and ever since have remained validly secured by the lien of the said mortgage, which, by reason of the foreclosure proceedings promoted as aforesaid by the construction company and by reason of the conveyance made as aforesaid by the construction company, was a first lien upon the Mexican National railroad, thus securing precedence of other claims held by the construction company. The defendant received the benefits of the said $12,500,000 in par value of bonds and the proceeds thereof as mentioned in the Matheson-Palmer agreement. Of the said bonds $9,500,000 or about that amount in par value thereof, were sold at not less than eighty per cent. net at New York, and the proceeds received by the defendant, as mentioned in and in pursuance of the second subdivision of the fifth article of the Matheson-Palmer agreement. In such sum was included and the defendant received the sum of $217,000 to liquidate and with which, in consideration of the conveyance to it of the Mexican National railroad and of other considerations flowing in large part from the con-

struction company, the defendant promised to liquidate and pay the indebtedness of the railway company as provided in the Matheson-Palmer agreement.

VIII. The defendant, by reason of matters aforesaid and otherwise, became bound by the Matheson-Palmer agreement. In consideration of the matters aforesaid or some of them or of other considerations, the defendant undertook to perform and has in large part performed the duties or matters imposed upon the "New Company" mentioned in or contemplated by the said agreement.

13 The defendant likewise became bound to pay to the creditors of the railway company to whom moneys were owing by the railway company at the date of the Matheson-Palmer agreement, the sum of $217,000 or so much thereof as should be necessary to liquidate the indebtedness on that date of the railway company.

IX. The defendant has, since it received the sum of $217,000 as aforesaid, treated and admitted such sum as owing by it to the creditors of the railway company who were such at the date of the Matheson-Palmer agreement, as a fund for their payment as aforesaid; and all or substantially all of such creditors of the railway company have been fully paid excepting only the construction company or the present plaintiff as assignee of the construction company as hereinafter mentioned, and excepting also that certain notes made by the railway company and endorsed by the construction company which were outstanding on the 15th day of October, 1886, were thereafter paid out of the proceeds of certain securities belonging to the construction company thereafter sold and not forming any part of the said sum of $217,000.

X. Of the said sum of $217,000 there remains to liquidate the indebtedness of the railway company, after the payments aforesaid made by the railway company and in excess of any unpaid amounts which were owing by the railway company at the date of the Matheson-Palmer agreement and which are still owing—a sum exceeding $111,454.28, with interest thereon from the 15th day of October, 1886.

XI. After the happening of all the matters aforesaid and before the commencement of this action, the construction company duly assigned, transferred and set over unto the plaintiff the cause of action of the construction company against the defendant

14 hereinbefore set forth, and all the claims of the construction company against the defendant arising out of the said provisions of the said Matheson-Palmer agreement with reference to the said fund or sum of $217,000 mentioned therein as aforesaid, and all moneys due or to become due upon the said claims or either of them, and every right of action of every description whatsoever of the construction company against the railway company by reason of such claims or any of them, and also the entire interest and right of every description whatsoever of the construction company in and to the said fund or sum of $217,000.

And the plaintiff further alleges, upon his information and belief:

For a Second Cause of Action.

I. The plaintiff renews and repeats all the allegations hereinbefore contained relating to the first cause of action.

II. After the receipt by the defendant of the sum of $217,000 hereinbefore mentioned, which sum was so received in or about the latter part of the year 1887, pursuant to the Matheson-Palmer agreement, the construction company requested payment by the defendant of the said sum of $111,454.28, with interest from the 15th day of October, 1886. The defendant, after promising, in pursuance and in consideration of the Matheson-Palmer agreement, to pay to the construction company so much of the said claim of the construction company as should have been owing by the railway company to the construction company on the 15th day of October, 1886, and as the portion of the said fund of $217,000 remaining after deducting therefrom the amount due other creditors would pay, did, on or about the 14th day of April, 1890, enter into a certain agreement of arbitration with the construction company, a copy
15 of which is annexed to this complaint as part thereof and entitled "Arbitration agreement."

III. After the making of the said arbitration agreement, the construction company and the defendant proceeded from time to time with the hearing and taking of testimony before the arbitrators therein named, and the construction company in all respects on its part fully performed the said arbitration agreement. Upon further agreement between the construction company and the defendant, the time limited by the arbitration agreement for the completion of the arbitration was from time to time extended beyond the three months after the 25th day of April, 1890, mentioned in the said agreement, to successive respective days certain, the last extension to a day certain being until the first day of July, 1891. On or about the 8th day of June, 1891, Treadwell Cleveland, Esq're, the arbitrator upon the said arbitration named by the defendant, was engaged in the conduct of a trial, which conduct was claimed by him and the defendant to prevent his conveniently proceeding with the said arbitration. The defendant then asked the construction company to agree to a suspension of the proceedings upon the said arbitration. On or about the 8th day of June, 1891, a stipulation was made between the construction company and the defendant that further proceedings upon the said arbitration should be suspended until five days after the conclusion of the said trial in which the said Cleveland was engaged, and that then and thereafter the hearings on the arbitration should proceed *de die in diem* (meaning from day to day) until the conclusion of the said arbitration, the hours to be from two until five o'clock each day except Sundays. Thereafter and on or about the 16th day of July, 1891, the defendant served upon the arbitrators a notice, a copy of which is annexed to this complaint as part thereof and entitled "Defendant's
16 notice of revocation of arbitration;" and thereupon and thereafter the defendant wholly refused to proceed with the arbi-

tration or otherwise to perform the said agreement, and in all respects broke and violated the said agreement. Such breach of the said agreement was without right or excuse on the part of the defendant and by reason of such breach the construction company suffered damage in the sum of at least seventeen hundred and thirty-one dollars.

IV. On or about the 20th day of August, 1891, the construction company was required to and did pay to the Honorable Charles S. Fairchild, being one of the arbitrators named in the said agreement, the sum of $1,250, being one-half the reasonable value of the services of the said Fairchild as such arbitrator. This payment the construction company was bound to and did make by reason of the said agreement of arbitration, and the benefit of such payment was wholly lost to the construction company by reason of the defendant's breach of the said agreement of arbitration.

V. In the proceedings upon the said arbitration, the construction company incurred as a necessary and proper expense in the conduct thereof, and was compelled to and did pay, on or before the 20th day of August, 1891, the further sum of $481 for stenographer's fees and for printing the record of the proceedings before the arbitrators.

VI. Among other damage sustained by the construction company by reason of the defendant's breach of the said agreement of arbitration, was damage in the sum of $1,731, being the sum of the two amounts respectively of $1,250 and $481 hereinbefore mentioned.

VII. After the 20th day of August, 1891, and before the commencement of this action, the construction company duly assigned, transferred and set over unto the plaintiff all the claims of
17 the construction company against the defendant referred to in the said agreement of arbitration, and all right or rights of action under the said agreement of arbitration, and also any and every claim of the construction company against the defendant arising out of the said agreement of arbitration or the breach thereof by the defendant, and all right or rights of action accrued or to accrue to the construction company by reason of the said agreement of arbitration or the claims mentioned therein or the claim of the construction company arising therefrom.

Wherefore, the plaintiff demands judgment against the defendant for the sum of one hundred and eleven thousand four hundred and fifty-four and $\frac{28}{100}$ths dollars ($111,454.28), with interest thereon from the 15th day of October, 1886, and also for the sum of seventeen hundred and thirty-one dollars ($1,731), with interest thereon from the 20th day of August, 1891, together with the costs of this action.

PARSONS, SHEPARD & OGDEN,
Attorneys for the Plaintiff, 111 *Broadway, N. Y. City.*

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph A. Davidson, being duly sworn, says: I am the plaintiff above named. The foregoing complaint is true of my knowledge,

except as to the matters therein stated to be alleged upon information and belief, as to which matters I believe the same to be true.

J. A. DAVIDSON.

Sworn to before me this 8th day of October, 1891.

R. J. FOX,
Notary Public, N. Y. Co.

18 *Matheson-Palmer Agreement.*

Memorandum of agreement made this fifteenth day of October, 1886, by and between Messrs. Matheson & Company, of No. 3 Lombard street, London, England, representing certain holders of first-mortgage six per cent. gold bonds of the Mexican National Railway Company under an agreement dated the 7th day of June, 1886, parties of the first part, and General William J. Palmer, of the city of New York, representing the Mexican National Railway Company, the Mexican National Construction Company, and certain of the holders of said first-mortgage six per cent. gold bonds, as party of the second part.

Whereas, the Mexican National Railway Company has made default in the payment of the coupons for interest of its first-mortgage six per cent. gold bonds, and the construction and completion of its railroad cannot be proceeded with, and all the parties interested in the said company are desirous of arranging so that the funds required to complete said railroad may be obtained and that a sound and permanent reorganization of the undertaking can be accomplished;

Now, therefore, it is agreed by and between the parties hereto that the following plan shall be carried out:

19 First. A proceeding or proceedings to foreclose the existing first mortgage or to enforce the rights of the holders of existing first-mortgage bonds shall be commenced and prosecuted with the consent, as far as practicable, of all parties in interest, and a sale in foreclosure be had of the railroad and property as speedily as may be, to carry out this plan. Pending such proceedings the present company shall continue in possession and operate the property until sale, and the appointment of a receiver shall be avoided.

Current monthly reports of the business shall be furnished the parties hereto, showing earnings and expenses.

Second. At any sale of said railroad and property under such proceedings the same shall be purchased, under suitable limitations as to terms, by a committee of three persons, to be nominated as follows: Each of the parties hereto shall nominate one member, and the parties hereto shall mutually agree on the third member, and the party of the first part accordingly nominates Eckstein Norton, of New York, as one member of such committee; and the party of the second part nominates Joseph D. Potts, of Philadelphia, as another member of such committee, and the parties mutually agree upon Albert Fink, of New York, as the third member, and the

chairman of such committee. In case either of said three persons shall be unwilling to act, or resign, or be unable for any reason to serve, his successor shall be named by the party who nominated him as aforesaid, or by the parties mutually agreeing to his nomination, as the case may be, according to the foregoing principles, and such new selections, if any, shall be made of gentlemen of like high character and fitness, and not personally objectionable to either of the parties hereto.

This committee shall organize the new railway company as hereinafter provided, and do whatever is necessary to convey to
20 the respective parties entitled thereto as herein provided, concurrently, whatever property the committee shall acquire by purchase as above provided, and generally shall do whatever may properly devolve upon it to carry out the provisions of this agreement.

Third. A new railway company shall be organized under the laws of Colorado to take over that part of the railway and property, rights and interests which it is contemplated shall become its property under the article hereinafter contained relating to segregation, and to carry out the other provisions of this agreement pertaining to it; and the Mexican National Construction Company shall take over the part designed for it. Such new railway company shall be vested with all the rights and prowers to construct, maintain and operate that part of the railway and property, &c., taken over by it, whether such rights and powers have been heretofore owned and exercised by the Mexican National Railway Company or by the Mexican National Construction Company.

Fourth. The constructed part of the so-called Interoceanic line extending from the city of Mexico via Acambaro to Patzuaro, about two hundred and seventy-four (274) miles, together with the constructed parts of the El Salto line and the constructed and unconstructed parts of the Cintura line, the constructed parts of such two lines aggregating together about fifty-four and one-half (54½) miles, including also the tramway in the city of Mexico from Colonia station to its terminus; also the San tiago station lands, being about sixty-five acres, in the city of Mexico, and the Colonia and Ciudadela station lands, being about thirty acres, in said city; also the constructed and unconstructed parts of the so-called International line, viz., extending from Acambaro to New Laredo, and a connection with the Texas-Mexican railway, about six hundred and ninety (690) miles, three
21 hundred and eighteen of which are constructed; also the so-called Sabinas coal road, being about seventy-five (75) miles unconstructed, and all rights pertaining thereto, except the subsidy, which is otherwise hereinafter pledged, including any of its branches or extensions, and also the constructed and unconstructed parts of the Matamoras-Monterey line, about two hundred and eleven (211) miles, whereof over seventy-five (75) miles have been constructed, shall be segregated from the other lines covered by or embraced within the concessions granted by the Mexican government, and such constructed and unconstructed lines so segregated with all

rights thereto pertaining, except as to subsidy, which is herein otherwise pledged, including the rights to construct the above-named unconstructed parts thereof; and also including telegraph lines and franchises constructed or to be constructed along the foregoing-described routes, shall become the property of the new railway company, unencumbered and free from all liens or claims of the construction company, except so far as it is or shall become the holder of securities entitled to a lien or claim thereon, or be itself entitled to any equitable interest in the unearned subsidy which is to be pledged as provided in this agreement; and the remaining railroads, properties and rights shall become and be the property of the construction company, unencumbered, free and clear of all liens created by the old or new company and claims on the part of the old or new railway companies.

And whereas, the Mexican National Railway Company by lease holds and operates the Texas-Mexican railway and branches, and owns 24,537½ shares of the capital stock of the Texas-Mexican Railway Company, the total issue whereof is 25,000 shares, and 1,196 of the said railway company's bonds of a total issue of 1,380 and also has an interest in 248 bonds of the Corpus Christi, San Diego and Rio Grande narrow-gauge road, secured by an underlying lien on said Texas-Mexican railway, of a total issue of 960, and said
22 leasehold rights and the said stock and bonds or interests, of the Mexican National Railway Company therein are subject to its existing mortgage, the said new railway company shall own and acquire by such foreclosure, and by transfer from the Mexican National Railway Company such leasehold rights as well as all its interests in said bonds and stock, and by virtue thereof will hold and control the Texas-Mexican railway extending from a connection with the International line in Mexico to Corpus Christi, comprising, with spurs and branches, about 165 miles of railway.

The new railway company will thus have, when the International line and the coal road are finished, an aggregate of 1,334 miles of railway, which includes all present constructed railroad, except 28 miles at Manzanillo and about 18 miles at Zacatecas and about 15 miles at Galveston. It will also have the right to build the railway and telegraph lines for the gap in the International line and the coal road, and all extensions and branches thereof, and to complete the Matamoras and Cintura lines.

The parties agree to co-operate to obtain the consent of the Mexican government to such segregation and the transfer of rights and franchises; and the companies interested shall interchangeably execute all and any proper instruments to carry the provisions of this agreement fully into effect.

The present railway company is to be wound up and dissolved as soon as practicable after the new company shall have come into possession of its properties.

Fifth. There shall be created a first and paramount lien or mortgage covering all the railway company's properties, rights and interests to be acquired hereunder, including therein all the rolling stock and equipment which it is to acquire as hereinafter stated; and the afore-

said leasehold interests and said 1,196 bonds and 24,537½ shares of the capital stock of the Texas-Mexican Railway Company,
23 and interest in said 248 bonds of the Corpus Christi, San Diego and Rio Grande Narrow Gauge Railway Company, to secure $12,500,000 par value of principal of the bonds of the new company, hereinafter denominated new first-mortgage bonds, due in forty years from their date, bearing six per cent. interest, payable semi-annually, principal and interest payable in gold coin of the United States of or equal to the present standard of weight and fineness. The mortgage shall also cover all additional lines or branches constructed out of the proceeds of the bonds secured thereby, but shall not cover any of the unconstructed parts of the routes acquired by the new railway company and the rights pertaining to such unconstructed parts, except the gap in the International line and seventy-five (75) miles (being the subsidized portion) of the Sabinas coal road and the gap in the Cintura road, and excepting also such further extent of new railroad as shall be built with proceeds of the new first-mortgage bonds.

In addition to the security of this first lien upon the new railway company's properties, rights and interests, these bonds shall have the security of $7,000,000 subsidy, which is to be derived, pledged and deposited as hereinafter provided.

The new railway company shall have the power to pay off and cancel all or any part of these new first-mortgage bonds, at par and interest, on any date when any coupon matures, having given six months' previous notice; and the construction company shall have the same right as the railway company to pay off and cancel these bonds, and the bonds so paid off shall be canceled. If the payment be only of a part of such bonds the bonds so to be paid off shall be selected by drawings.

The mortgage or trust deed and the pledge of subsidy to be made to secure these bonds shall contain proper provisions so as to insure speedy and effectual remedies in the case of default, by any and all available legal methods, without irksome restrictions or unusual provisions; and such further provisions as shall secure the
24 application of the net proceeds, as hereinafter defined, of the subsidy collected, as follows:

1st. To meet any deficiency of interest on such new first-mortgage bonds, after applying net earnings of the railroad to the payment of such interest, and exhausting any other moneys available therefor.

2d. To the payment at par, by drawings, of such new first-mortgage bonds and cancellation thereof as and when subsidy may be collected and available therefor.

These new first-mortgage bonds shall be applied:

$2,000,000 to the construction company in consideration of its transfer as hereinafter provided to the new railway company of all equipment certificates and all title to rolling stock and equipment (except rolling stock, equipment and material for equipment on the Manza-

nillo and Zacatecas divisions, not exceeding in amount at, original value, $125,000), the intention being that the new railway company shall acquire and own all rolling stock and equipment now on the road or acquired for use thereon, whether actually in use or not set up, excepting that which is on the two divisions above named, and it being represented and understood that the original cost of such rolling stock exceeded $2,000,000 cash.

$9,500,000, or about that amount of bonds to be sold at not less than eighty per cent. net New York, and to be applied to furnish money needed to complete and equip the International line, including expenses incident
25 thereto; to construct and equip the Sabinas coal road; to provide an interest reserve of $650,000, or so much thereof as may be needed to pay interest on any new first-mortgage bonds until such interest shall be earned (any portion of such $650,000 not required for this purpose shall be added to the capital reserve); and for the following purposes: Out of the proceeds of these bonds there shall be paid the expenses of foreclosure and reorganization, including the expenses in connection therewith already or hereafter incurred by the parties hereto; and a sum not exceeding $217,000 to be applied to liquidate the indebtedness of the existing railway company; a sum now estimated at $200,000 to be paid in liquidating and extinguishing the underlying lien of the El Salto branch; and finally, a sum not exceeding $700,000 to be paid to the construction company to enable it to discharge all its outstanding indebtedness, but for such payment the construction company shall sell and deliver to the new railway company existing first-mortgage bonds or their equivalent in new securities into which the same may have been converted as hereinafter provided, to an amount equaling $2,500 in existing first-mortgage bonds or their equivalent in new securities for every $700 in money paid. The bonds so acquired by the new railway company, or their equivalent in new securities, to constitute a betterment fund, applicable for betterments only, on and upon that property covered or to be covered by the mortgages herein provided for; but inasmuch as the construction com-
26 pany heretofore pledged 200 existing first-mortgage bonds as security to keep indemnified certain sureties on the transportation bonds given on behalf of the present railway company to the United States Government, it shall have the right on transferring its residuary interest in said 200 bonds or their equivalent in new securities to have the same counted as

part of the bonds sold or delivered under this provision, and if it exercises this right, the 200 bonds or their equivalent in new securities issued in lieu thereof shall remain subject to the said pledge and not become a part of the betterment fund until released from such pledge. In case any of said $9,500,000 in new first-mortgage bonds or of the proceeds thereof shall not be required for the above purposes or any thereof, such surplus bonds or proceeds shall be added to the capital reserve next named.

$1,000,000, or about that amount of the new first-mortgage bonds to remain in the treasury of the new railway company as a capital reserve, but which may, if necessary, be applied to meet deficiency of interest on the new first-mortgage bonds that cannot be currently met out of the earnings of the railroad or from the net proceeds of subsidy collected as hereinbefore provided. Bonds in the capital reserve shall not draw interest while they remain in the treasury of the new company.

It is however expressly agreed that the amount of this new
27 first mortgage and of the bonds to be issued thereunder may be increased to thirteen million five hundred thousand dollars, provided the holders of a majority in amount of the new "A" and "B" bonds and of the income bonds hereinafter provided for and the construction company shall severally consent and agree thereto in writing duly acknowledged or proven, such increased amount of one million dollars to be added to the capital reserve above provided for. But in case of issue of all or any part of such additional one million first mortgage bonds, an equal amount of new "A" and "B" bonds shall likewise be issued and deposited with the $7,924,000 bonds provided for in article sixth to be used therewith only to retire or replace at par a like amount of such new first-mortgage bonds, dollar for dollar.

Sixth. To represent the existing first-mortgage bonds there shall be created and issued second-mortgage bonds which shall rank next after the new first-mortgage bonds in priority of lien upon all the railway company's properties, rights and interests, including the said rolling stock and equipment, bonds and stocks that are or may be covered by the first mortgage, but shall not have any lien on the $7,000,000 subsidy or the net proceeds thereof pledged to the payment of the new first-mortgage bonds and the interest thereon.

The aggregate amount of these new second-mortgage bonds shall not exceed $25,000 per mile on the basis of 1,334 miles, say $33,350,000, except in case of and to provide for the eventual retirement of any part of the additional million new first-mortgage bonds referred to in article fifth, in which contingency an additional amount of "A" and "B" bonds shall be issued and deposited dollar for dollar, to provide for such retirement. And all of said new second-mortgage bonds shall be divided into two classes, half of the total being in "A" bonds which will bear six per cent. interest from

January 1, 1887, accumulative, payable in cash as and when earned out of any net earnings of any year remaining after
28 interest on new first-mortgage bonds outstanding shall have been paid for such year, and if in any year the net earnings so remaining available for payment of the interest upon said "A" bonds, shall not be sufficient to pay in full the interest thereon at six per cent. per annum, there shall be paid any part thereof earned and available; and any deficiency shall not be waived, but shall be paid to the holders of such "A" bonds out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose; the intention being that said "A" bonds outstanding shall be entitled to and shall receive full interest in cash at the rate of six per cent. per annum, as and when, and whenever there shall be any net earnings available therefor before the outstanding "B" bonds hereafter named shall receive interest. For greater convenience of payment, said "A" bonds shall bear half-yearly interest coupons, but no distribution of net earnings by way of partial payments upon such interest coupons shall be obligatory on the company at any time, unless the amount available shall, at that time, be equal to one per cent. upon the outstanding "A" bonds.

The remaining half shall be in "B" bonds which shall bear six per cent. interest from January 1, 1887, non-accumulative, payable in cash out of any net earnings of any one year, remaining after all interest then due on "A" bonds shall have been fully paid; and if, in any year, the amount of such net earnings shall not be sufficient for the full payment of such interest on said "B" bonds there shall be paid any part thereof earned and available, and any deficiency, whether partial or total, shall be waived and relinquished.

The principal of the "A" and "B" bonds shall be payable thirty years after their date, and principal and interest shall be payable in gold coin of the United States of or equal to the present standard of weight and fineness.

29 Bonds of either class may be in denominations of $1,000 or $500, as may be convenient.

Of the above total amount at the rate of $25,000 per mile there should be reserved $9,020,000 in bonds, whereof $7,924,000 are to be issued only to retire or replace at par a like amount of new first-mortgage bonds, dollar for dollar; $896,000 are to be issued only to retire or replace a like amount of bonds now existing on the Texas-Mexican railway; $200,000 shall be issued and added to the betterment fund, but only after the lien now existing on the El Salto branch shall have been paid off.

Proper provisions shall be made in the trust deed or mortgage given to secure the "A" and "B" bonds to prevent foreclosure thereof by reason of any default on said "A" and "B" bonds while the railroad and property shall be in the control of the bondholders as hereinafter provided; but there shall be an adequate power to foreclose and sufficient remedies if the property should revert to the control of the stockholders and if default shall follow and control not be restored to the bondholders as hereinafter provided; said

mortgage to be in form satisfactory to Charles C. Beaman, of New York, or other counsel of Matheson & Company.

The "A" and "B" bonds shall be issued as hereunder:

"A" Bonds.

$12,165,000 to the holders of existing first-mortgage bonds.
3,962,000 only to be issued with same amount of "B" bonds *of* the first-mortgage bonds shall have been paid on in exchange therefor dollar for dollar.
448,000 only to be issued with same amount of "B" bonds to replace or retire a like total of Texas-Mexican bonds.
100,000 30 only to be issued with same amount of "B" bonds and added to the betterment fund when the El Salto lien shall have been paid off.

$16,675,000 total, equal to $12,500 per mile, on 1,334 miles.

"B" Bonds.

$12,165,000 to the holders of existing first-mortgage bonds.
3,962,009 only to be issued with same amount of "A" bonds after the new first-mortgage bonds shall have been paid, or to retire a similar total of new first-mortgage bonds.
448,000 only to be issued with same amount of "A" bonds to replace or retire a like amount of Texas-Mexican bonds.
100,000 only to be issued with same amount of "A" bonds and added to the betterment fund when the El Salto lien shall have been paid off.

$16,675,000 total, equal to $12,500 per mile on 1,334 miles.

"A" and "B" bonds reserved to replace, retire or pay off new first-mortgage bonds or bonds secured by a lien on the Texas-Mexican railway, or the lien on the El Salto branch, or reserved as a betterment fund, shall not draw interest until actually issued, provided that when they or any of them shall be sold or used for any of such purposes they shall have the same and no other position in respect of interest accrued and unpaid as outstanding bonds of the same description have at that time. Holders of present bonds assenting to this plan and performing its conditions shall receive at the rate of $500 in "A" bonds together with $500, in "B"
31 bonds for every $1,000 of principal in present bonds with all overdue coupons attached, and such assenting present bondholders shall have the preferred right to subscribe *pro rata* upon the most favorable terms, to the new first-mortgage bonds to be created and subscribed for as hereinafter provided; but such preferred right shall not be held to preclude the payment of a commis-

sion to a syndicate to guarantee and assure the subscription to said new mortgage bonds if such be necessary or advisable.

Seventh. The capital stock of the new railway company shall be $33,350,000, whereof $25,875,000, shall be issued to stockholders of present railway company dollar for dollar; $46,250 shall be reserved to be issued only in exchange for an equal amount of Texas-Mexican stock now in the hands of third parties; and the balance of $7,428,750 shall be issued to the construction company as hereinafter provided.

The stock shall be issued only subject to the conditions hereinafter contained.

Eighth. The Mexican National Construction Company shall—

1st. Assign to the new railway company all rolling stock and equipment now upon the lines, whether in operation or not set up, except that now on the Zacatecas and Colima divisions, by assigning all equipment certificates and all other title therein, so that the railway company shall be vested with the sole title to said rolling stock or equipment whether actually in use or not set up, and be enabled to include the same as security under its mortgages, free of all other incumbrance.

2d. Transfer to the new railway company all materials and supplies at points on the line in Texas from Corpus Christi to
32 Laredo and anywhere in Mexico, excepting construction material on the railroads running to or from Manzanillo and Zacatecas; the materials and supplies so transferred shall belong to the new railway company.

3d. Pledge $7,000,000, of subsidy earned and to be earned, of which three million is earned and four million to be earned by completing the International road and coal road. Said pledge to be free from any other lien except the charge hereinafter created.

This subsidy so pledged is to constitute a fund for the additional security and retirement of the new first-mortgage bonds as before stated.

The pledge of this subsidy shall be to the trustees of the new first mortgage, and by the terms of said pledge and mortgage the said subsidy shall be available and used for the payment and security of said new first-mortgage bonds before the other property mortgaged to secure the same, but all equities in the subsidy so pledged shall belong to and be the absolute property of said construction company after the said bonds have been paid and cancelled.

4th. Against the payment of not to exceed $700,000 cash out of the proceeds of new first-mortgage bonds the construction company shall deliver to the new railway company first-mortgage bonds of the old railway company or securities into which such bonds shall be converted to an amount equaling $2,500 in such present bonds for every $700 cash paid.

The construction company shall receive $7,040,000 in income bonds secured by lien on all the new railway company's properties, subject to the liens securing the new first-mortgage bonds and the said new second-mortgage "A" and "B" bonds, and this mortgage shall cover the same property as said second mortgage.

These income bonds shall be entitled to receive interest
33 up to six per cent. per annum in United States gold coin of or equal to the present standard of weight and fineness if and when earned, but not accumulative, after payment in full of all interest on the new first-mortgage bonds and the "A" and "B" bonds, as previously stated herein.

No further income bonds shall be issued, and the trust deed or mortgage securing the same shall be in such form and of such tenor and effect consistent with the provisions hereof and the prior rights of the new first-mortgage and "A" and "B" bonds as the construction company or its counsel shall require.

The construction company shall also receive capital stock of the railway company to an amount equal to the difference between $25,000 in stock per mile on 1,334 miles		$33,350,000 00
And the amount already issued ...	$25,875,000 00	
To which must be added stock of the Texas-Mexican Railway Company held by third parties.....	46,250 00	
Total.....		25,921,250 00
Balance, to wit		$7,428,750 00

All contracts between the construction company and the railway company relating to building the Matamoras line to be cancelled and the construction company saved against its obligations by reason thereof. And the new railway company is to assume all obligations to the Mexican government connected with said line and is to be entitled to receive the subsidy pertaining to all extensions thereof. It being the intention that the second-mortgage "A" and "B" bonds shall eventually be a first lien on the property at a rate of $25,000 per mile on the basis of 1,334 miles, any of said "A"
34 and "B" bonds reserved for the purpose of taking up or replacing an equal amount of new first-mortgage bonds which shall not be used for such purposes because of the application of the subsidy, shall, upon payment of all the new first-mortgage bonds in full, be delivered to the construction company as its property, and so likewise shall any part of the $7,000,000 subsidy, which may remain after the new first-mortgage bonds shall have all been paid, be turned over to the construction company.

But if said new first-mortgage bonds shall be paid off by the railway company out of its own funds or assets, then and in such case and to the extent to which such payments shall have been made by it and from sources other than the subsidy and the reserved new second-mortgage "A" and "B" bonds, the construction company shall not be entitled to claim the delivery to it of reserved second-mortgage "A" and "B" bonds or subsidy, unless it reimburse the new railway company to the extent of such payments.

The construction company is to be protected against any claims of third parties upon all current tie, lumber, fuel and other supply

contracts for the operation and maintenance of the railways in Mexico that become the property of the new railway company.

The construction company shall have the right to have the "A" and "B" bonds reserved for the payment of the new first-mortgage bonds applied to that purpose in accordance with the provisions hereof.

The present second-mortgage debentures shall be cut off by foreclosure, or the debentures surrendered and cancelled, and the deed — trust or mortgage given to secure them shall be satisfied.

Ninth. All the stock of the new railway company, except enough to qualify directors, shall be lodged in a voting trust and representative certificates issued thereagainst so as to insure control of the railroad to the new first-mortgage and new second-mortgage "A" and "B" bondholders, to be exercised as hereinafter provided; the new first-mortgage bonds to have twice as many votes as "A" and "B" bonds in respect to equal amounts.

Such control shall continue until the full interest at six per cent. per annum has been duly and regularly earned and paid for two consecutive years upon all outstanding new first-mortgage bonds, and upon all outstanding new second-mortgage "A" and "B" bonds, when the stock shall be released against surrender of the representative certificates, and in the event that at any time subsequent to such release there shall be any failure in any half year to pay such full interest upon said new second-mortgage "A" and "B" bonds, the lien thereof may be foreclosed unless the stockholders shall within four months after default, lodge in the voting trust not less than 180,000 shares out of 333,500 shares, or a like proportion, if at any time said capital stock be increased, to be again controlled by the bondholders as hereinbefore provided; but no increase of capital stock shall be made while the stock is in the voting trust.

The board of directors shall consist of not exceeding thirteen members, five of whom are, by the concession, required to be residents of Mexico, two of which five must be nominees of the Mexican government. The holders of new first-mortgage and second-mortgage "A" and "B" bonds shall have the right to nominate six of the directors resident in the United States and two of the directors resident in Mexico; and the holders of certificates evidencing the deposit of shares in the voting trust shall have the right to nominate two of the directors resident in the United States and one of the directors resident in Mexico.

It shall be the duty of the voting trustees to vote for a board composed of the representatives so nominated. Vacancies happening in any board so elected shall be filled in accordance with the foregoing principles by the election of the nominees of the party whose representative in the board shall have ceased to be a director.

As it will be necessary to organize the new railway company to take over the property before the voting trust can be established, the said purchasing committee shall nominate the board of directors to be named in the articles incorporating the new railway company, and in nominating such board of directors the said committee shall

be governed as nearly as practicable by the principles of representation of bondholders and stockholders laid down in this article. If the new first-mortgage bonds shall then be wholly or partially subscribed, or taken and paid for in part, the said committee shall accord representation on the basis provided for in said article to such subscribers, as if they had paid their subscriptions in full and become bondholders, and shall adopt suitable methods to ascertain the wishes of the parties so entitled to nominate directors as herein provided. The board thus selected shall be a provisional board, and as soon as the voting trust can be established a formal election shall be held according to the provisions thereof to select a regular board of directors to take the place of the provisional board and manage the property as herein provided.

Tenth. Net earnings wherever mentioned herein, shall be so much of the earnings of said properties during any one calendar year (January 1st to December 31st), as shall remain after deducting all general and operating expenses and all expenses for repairs, renewals and replacements, taxes, if any, and insurance during said period.

Eleventh. The construction company shall have the right at its own expense to appoint and employ an engineer and an accountant, who shall directly or through their representatives, have access to all books, papers and accounts, and other sources of information relating to the railway company and its affairs, all the details and statistics of traffic, and of all earnings and expenses, receipts and outlays.

37

Twelfth. The $2,500,000 subsidy heretofore pledged for the $5,000,000 first-mortgage bonds issued in London and known as Matheson bonds, to the extent that the same has not been applied already, shall remain applicable to the new second-mortgage "A" and "B" bonds which are to be issued against the bonds of that issue, and be applicable to redemption of such "A" and "B" bonds precisely as originally provided in a certain trust indenture, dated 1st July, 1882, made by the construction company to Smith and MacDonald.

A further trust indenture to be executed by the construction company to adjust and confirm the above pledge and also the guarantee of £10,000 per annum as in the original trust deed provided, with power in the trustees to collect such subsidy.

Thirteenth. The trustees with whom the $7,000,000 subsidy shall be deposited shall, if necessary, advance out of the proceeds of such subsidy collected, not to exceed $50,000 United States currency, or £10,000 (pounds) per annum, as required by said Matheson subsidy trust indenture of July 1, 1882, said trustees to be reimbursed for such advances out of subsequent collections as in said trust indenture provided.

And in order to enable the construction company to maintain its corporate organization and comply with its obligations to the Mexican government, there shall be paid to it by such trustees a sum equal to thirty-five thousand ($35,000) dollars per annum, United States currency, for the period of five years only and no more (com-

mencing January 1, 1887) out of the proceeds of subsidy deposited under this plan, the above payments to be made out of any subsidy collections before there shall be any net proceeds of subsidy applied to any other purpose. The existing order of subsidy
38 collections shall be maintained, and all subsidy earned as well as that to be earned by the respective parties shall be collectible in the order earned.

Fourteenth. As soon as practicable after this plan shall be ratified as hereinafter provided, a subscription shall be formed to take not less than $8,500,000 of the new first-mortgage bonds at a price netting not less than eight hundred dollars ($800) cash in New York for every thousand dollars in such bonds.

Money raised by the sale of new first-mortgage bonds shall be deposited in a trust company in the city of New York, only to be expended for the purposes herein mentioned, under proper checks.

Fifteenth. The parties hereto agree to deposit all present first-mortgage bonds owned, held or controlled by them respectively, subject to the order of the purchasing committee, with a trust company of New York to be selected by the parties hereto against its negotiable receipts therefor in form hereafter to be agreed upon and to endeavor to obtain the concurrence of all bondholders to the speedy deposit of their bonds in like manner in order to secure the early execution of this plan. Such committee to have in respect of the bonds so deposited, full power to purchase the mortgaged premises at the foreclosure sale, and to apply the said bonds in payment of the purchase price thereof, and to raise money by the pledge of said deposited bonds to pay to non-assenting bondholders their distributive share of said purchase price. The committee, if they shall deem it proper, in order to provide for expenses, may raise such sums as may be necessary by the hypothecation of the bonds and coupons deposited, to be borne by the assenting bondholders *pro rata*. In case any of the present first-mortgage bondholders shall not assent to this plan, and the committee hereby appointed are required to pay to them their distributive share of the pur-
39 chase price at said foreclosure of said mortgaged premises, then the "A" and "B" bonds which would be given in exchange for the bonds of said non-assenting bondholders, if they had assented hereto, shall be issued and sold by the said committee to the extent to which it may be necessary to repay to said committee whatever they shall have paid to said non-assenting bondholders, and any of said "A" and "B" bonds not required for such purpose shall be added to the betterment fund provided for in article 5th.

Sixteenth. It is understood and agreed that the ratification of this agreement herein provided for, and any assent thereto by bondholders is also given to such modifications or changes therein within the general scope and purpose thereof, as may be found desirable and agreed to in writing by the parties hereto.

Seventeenth. Messrs. Charles C. Beaman and Lyman K. Bass are hereby agreed upon as the attorneys and counsel to have charge and direction of the legal proceedings and the preparation of the requisite papers and instruments in the United States to carry this agree-

ment into effect, and Messrs. Louis Mendez and Emilio Velasco, of the city of Mexico, shall, under direction of said Messrs. Beaman and Bass, have charge and direction of the legal proceedings in Mexico, and of the preparation of the requisite papers and instruments there.

Eighteenth. It is further agreed that the new railway company shall assume all the obligations to the Mexican government of the present railway company which pertain to the parts of the railway property and lines to be acquired by it, and which are imposed by the concessions or the laws, and the new company shall conform, in all respects, to the concessions and laws which are imposed in that regard as the condition of its acquiring and operating said lines.

40 Nineteenth. It is understood that the execution of this agreement by Messrs. Matheson & Company is subject to ratification by certificate-holders, as provided in said agreement dated the 7th day of June, 1886, and that the execution of this agreement by General William J. Palmer is subject to ratification by said railway and construction companies and by the committee of bondholders at New York, of which Spencer Trask is chairman, which represents bonds deposited in the Central Trust Company under an agreement dated July 19, 1886, and the parties hereto promise and agree to earnestly endeavor to obtain the ratification thereof by the parties they respectively represent, and agree to co-operate faithfully together to carry out the foregoing plan, and in the faith that such ratification will be speedily had, the parties will at once proceed to institute the foreclosure proceedings herein contemplated.

MATHESON & CO.,
By H. W. SMITHERS,
Their Agent and Attorney-at-law
under Power dated 13*th July*, 1886.
WM. J. PALMER.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Henry Winthrop Hardon, a notary public duly commissioned and sworn, appointed to reside and residing in the county of Kings, with a certificate duly filed in the office of the city and county of New York, do hereby certify that on the fifteenth day of October, in the year one thousand eight hundred and eighty-six, before me, personally appeared Henry W. Smithers, to me known and known by me to be the individual who executed the foregoing agreement as the agent and attorney of Matheson & Co., and that the said Henry W. Smithers having been by me duly sworn, did de-

41 pose and say: That he was the agent and attorney of said Matheson & Co., of London, England, and that he executed the foregoing agreement in their name as and for their act and deed, and was thereunto duly authorized by an instrument dated July 13, 1886.

In witness whereof, I have hereunto set my hand and affixed my official seal this fifteenth day of October, 1886.

HENRY WINTHROP HARDON,
[NOTARIAL SEAL.] *Notary Public, Kings Co.*

Cert. in N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, the undersigned, Theodore H. Friend, a notary public duly commissioned and sworn, residing in the city and county of New York, do hereby certify that on this twenty-ninth day of October, 1886, before me, personally, at said city, came the said William J. Palmer, who is known to me to be one of the parties to the foregoing instrument, and who executed the same, and acknowledged to me the execution thereof, for the uses and purposes therein named.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year last aforesaid.

[NOTARIAL SEAL.] THEO. H. FRIEND,
Notary Public, N. Y. City and Co.

This agreement has been ratified by all the parties named in article nineteenth.

New York, November 16th, 1886.

42 United States Circuit Court, Eastern District of New York.

JOSEPH A. DAVIDSON
against
THE MEXICAN NATIONAL RAILROAD COMPANY. } Answer.

The defendant, appearing herein by Evarts, Choate & Beaman, its attorneys, answers the complaint herein and alleges as follows:

Answer to the first alleged cause of complaint:

First. It has no knowledge or information sufficient to form a belief as to whether the plaintiff is a citizen and resident of the United States of America and State of New York, and upwards of the age of twenty-one years. It admits that it is a railroad corporation created by and existing under the laws of the State of Colorado and owning and operating as its principal property the railroad within the Republic of Mexico, which is known as the Mexican National railroad. The defendant herein is hereinafter called the railroad company.

Second. It admits that the Mexican National Construction Company is and has been since on or about the 1st day of September, 1889, a corporation duly organized and existing under the laws of the State of Colorado, and that it was so organized for the purpose of building, owning and operating railroads within the Republic of Mexico, and among other railroads the railroad now known as the

Mexican National railroad. It admits that the said Mexican
43 National Construction Company, hereinafter called the construction company, has ever since its said organization been authorized by the said laws under which it was so incorporated, and also by the laws of the Republic of Mexico, to, and the said laws provided that it might construct, equip, operate, maintain or own railroads within the Republic of Mexico, and make contracts for the construction, equipment, operation, maintenance or ownership of such railroads, and do any and every act necessary or proper to such construction, equipment, operation, maintenance or ownership.

Third. It admits that the Mexican National Railway Company for a time prior to the year 1881 until a time after the first day of January, 1888, was a corporation duly organized and existing under the laws of the State of Colorado. Said Mexican National Railway Company is hereinafter called the railway company. By the laws of the State of Colorado, and also by the laws of the Republic of Mexico the said railway company was authorized to, and the said laws provided that it might construct, equip, operate, maintain or own a railway or railways within the Republic of Mexico, and especially the railway now known as the Mexican National railroad. It admits that the Mexican National railroad, as far as it was constructed at all prior to the 15th day of October, 1886, was constructed by the construction company for and upon the employment of the railway company, and prior to the 15th day of October, 1886, was delivered to the railway company by the construction company. It admits that on the 15th day of October, 1886, the railway company was the owner and in possession of and was operating the railway known as the Mexican National railroad, or so much thereof as was then constructed. It admits that the said railway, then including a
main line running from the city of Mexico to Nuevo Laredo,
44 all within the Republic of Mexico (except that the portion of the same about 350 miles between San Miguel and Saltillo, two points upon the said line, was not built or in operation), and included besides certain outlying branches. It admits that there have been at all times appurtenant to said railway some equipment, rolling stock and telegraph lines, and some of the other usual appurtenances of a railroad. The term Mexican National railroad, as hereinafter used in this answer, is intended to include not only the main line as described in this answer and outlying branches, but such equipment, rolling stock and telegraph lines and other appurtenances which were upon said road on October 15, 1886, but not including the portions of railway reserved to the construction company by the Matheson-Palmer agreement hereinafter mentioned. It admits that the construction company prior to the 15th day of October, 1886, had in the course of construction and equipment of the Mexican National railroad, performed work, labor and services, and furnished materials for use upon the said railroad and for the railway company. It admits that upon account of such work, labor, services and materials, the railway company prior to the 15th day of October, 1886, had paid to the construction company large sums of money, but upon information and belief, it denies that on

the 15th day of October, 1886, there remained over and above such sums unpaid of the reasonable price and value of the said work, labor, services and materials, the sum of $104,244.10, and it denies that on that day there was owing and unpaid by the railway company to the construction company for such work, labor, services and materials the said sum of $104,244.10 or interest thereon amounting to the sum of $7,210.18. It alleges upon information and belief that on October 15, 1886, there was no sum remaining unpaid over those already paid by the railway company to the construction company on account of the reasonable price and
45 value of such work, labor and materials as had been furnished by the construction company to the railway company.

Fourth. It admits that prior to the 15th day of October, 1886, the railway company had made, issued and duly and for value negotiated and disposed of certain six per cent. gold bonds to the amount of several millions of dollars, and had secured the same by a first mortgage upon the Mexican National railroad. It admits that the laws of Colorado and Mexico authorized such issuance and sale of bonds and the making of such mortgage, and provided that the same might be issued, sold and made. It admits that prior to the 15th day of October, 1886, the railway company had defaulted in the payment of interest upon its bonds, and there was danger that the mortgage would be foreclosed, and it admits that the railway company was also then involved in other pecuniary difficulties and embarrassments. It admits that the construction company was at that time the owner of a large amount of said bonds of the railway company, and also owned a large part of the stock of such railway company. It admits that the construction company was also the owner of a quantity of material and supplies designed for use in constructing the said railway or branches thereof, but it has no knowledge or information sufficient to form a belief as to whether the construction company was the owner of a large amount of rolling stock, equipment, materials and supplies originally intended for use upon roads connecting or intended to connect with said railway. It denies upon information and belief that the construction company was the owner of a large amount of rolling stock and equipment intended for use upon said road, and that without the use of some or all of the material and supplies aforesaid the railroad would have been seriously crippled. It admits that the construction company was the owner of a subsidy of seven millions of dollars theretofore granted by the Mexican government upon which payments
46 had from time to time theretofore been made, and upon which from time to time thereafter payments were to be made. It has no knowledge or information sufficient to form a belief as to whether the construction company had other rights and interests as mentioned or referred to in the said Matheson-Palmer agreement, but it admits that the construction company claimed to have such rights and interests.

It admits that in respect to the making of the said Matheson-Palmer agreement and the matters therein mentioned, Messrs.

Matheson & Co. of No. 3 Lombard street, London, England, on and prior to October 15, 1886, represented certain holders of the bonds of the railway company, and that William J. Palmer of the city of New York represented the railway company and the construction company, and claimed to represent certain other holders of bonds of the railway company.

It alleges that the said Matheson-Palmer agreement was made on or about October 15, 1886, and it alleges that it was entered into on the part of the said Matheson & Co. with the design to preserve to the utmost the interests of all holders of bonds of the said railway company, and to preserve the railroad property then belonging to the railway company, and with the design on the part of the said Palmer to preserve to the utmost the interests of the stockholders of the said railway company and those of the construction company, but it denies that the said Matheson-Palmer agreement was otherwise entered into to preserve to the utmost all the interests of all bondholders and stockholders of and all others interested in the railway company or its securities.

It admits that the said Matheson-Palmer agreement bore date on the 15th day of October, 1886, and that the paper annexed to the complaint as a copy of such agreement and entitled Matheson-Palmer agreement, is a correct copy thereof.

It denies, upon information and belief, that all the matters recited in said agreement are true, but it alleges that the said Matheson & Co., acting as aforesaid at the time of the making of the said agreement, believed them to be true. It admits that since the making thereof the said agreement has been carried out as to its principal features, and it denies, upon information and belief, that the said agreement has not been carried out as to the said sum of $217,000, and it alleges that as to all the duties incumbent upon it under the said Matheson-Palmer agreement, the said agreement has been carried out. It admits that on or before the 16th day of November, 1886, the said Matheson-Palmer agreement was duly ratified by all the parties mentioned in the nineteenth article thereof. It alleges that it appears by the said agreement that a part of the consideration to the construction company for making the said agreement was the promise and undertaking that provision for payment of debts of the railway company should be made as therein provided, but otherwise it alleges that it has no knowledge or information sufficient to form a belief as to whether such promises or undertaking as is contained in said Matheson-Palmer agreement in relation to debts of the railway company was a part of the consideration to the construction company for making the said agreement.

47

Fifth. It admits that in pursuance of the said Matheson-Palmer agreement the parties thereto procured the defendant to be duly incorporated as the Mexican National Railroad Company, proposed and mentioned in the said agreement as the new railway company, and it admits that the defendant was by such procurement and in large part by the procurement of the construction company, duly incorporated as aforesaid under the laws of the State of Colorado

on or about the 5th day of February, 1887. It admits that the defendant was so incorporated under and by reason of and to carry out the said agreement, but it denies that the defendant was so incorporated solely to carry out the said agreement.

48 Sixth. It admits that the defendant having been so incorporated desired to acquire the Mexican National railroad as provided in the Matheson-Palmer agreement and was unable to acquire the same except under and pursuant to the Matheson-Palmer agreement and by adopting and becoming a party to the said agreement. In pursuance of such agreement and in consideration thereof and after the incorporation as aforesaid, it admits that the construction company promoted and consented to proceedings to foreclose the mortgage made by the railway company as aforesaid, and by large part upon such procurement and with such consent, proceedings were in the months of February, March, April and May, 1887, conducted in the courts of the Republic of Mexico, and under the direction of the officials thereof, so that on or about the 24th day of May, 1887, a conveyance of the Mexican National railroad was by officials appointed by the courts of Mexico and by the construction company executed and delivered to the defendant, and thereafter under and by virtue of such conveyance the defendant entered into and has since remained in the possession and ownership of, and has since operated, and is now operating, and does now own said railroad.

It denies upon information and belief that the conveyance of the said railroad was delivered by the construction company and was accepted by the defendant solely in consideration of the Matheson-Palmer agreement, but it admits that the said conveyance was delivered by the construction company and was accepted by the defendant in partial execution of the terms of the said agreement. It denies upon information and belief that solely by reason of the terms of the said agreement, the construction company assigned to the defendant, and the defendant acquired rolling stock and equipment mentioned in the first subdivision of the eighth article of the said agreement, and that the construction company transferred to the defendant, and the defendant accepted materials and supplies

49 mentioned in the second subdivision of the eighth article of the said agreement, and that the construction company executed for and with the railway company a pledge of the seven-million-dollar subsidy mentioned in the third subdivision of the said eighth article of the said agreement, but it admits that the assignment and acceptance of such rolling stock and equipment, and the transfer and acceptance of materials and supplies mentioned in the second subdivision of the eighth article of the said agreement, and the said pledge of the said subsidy were in partial execution of the terms of the said agreement.

Seventh. It admits that the defendant having as aforesaid become the owner and in possession of the Mexican National railroad did in further pursuance of the said agreement, and on or about the first day of June, 1887, execute and deliver to Hugh M. Matheson and Charles Magniac, as trustees, a certain mortgage or trust

deed for the security of the first-mortgage bonds of the new company, namely, the defendant, as mentioned in the fifth article of the said agreement, and that since the execution of the said mortgage, the defendant in further pursuance of the Matheson-Palmer agreement, and especially of the fifth article thereof, has issued $12,500,000 in par value of principal of first-mortgage gold bonds, which bonds became and ever since have remained validly secured by the lien of the said mortgage, which was a first lien upon the Mexican National railroad. It denies upon information and belief that it received all the benefits of the said $12,500,000 in par value of bonds and the proceeds thereof as mentioned in the said agreement, but it admits that it received some of the benefits thereof. It admits that of the said bonds $9,500,000, or about that amount in par value thereof, were sold at not less than eighty per cent. net at New York, and the proceeds thereof received by the defendant as mentioned in and in pursuance of the second subdivision of the fifth article
50 of the said agreement, and it admits that in such sum was included, and the defendant received, the sum of $217,000 to liquidate, and with which the defendant promised to liquidate and pay the indebtedness of the railway company, as provided in the said Matheson-Palmer agreement, but it denies upon information and belief that such promise was in consideration of the conveyance to it of the Mexican National railroad, and of other considerations flowing in large part from the construction company.

Eighth. It admits that it undertook to perform, and has in large part performed, the duties or matters imposed upon the "new company" mentioned in or contemplated by the said agreement. It admits that by the terms of the said agreement it became bound to pay to the creditors of the railway company, to whom moneys were owing by the railway company at the date of the said Matheson-Palmer agreement, the sum of $217,000, or so much thereof as should be necessary to liquidate the indebtedness on that date of the railway company, but it alleges upon information and belief that the construction company was not a creditor of the railway company at that date, and whether a creditor or not, was not one of the creditors to pay whose claims the defendant received the said sum of $217,000.

Ninth. It admits that since it received the sum of $217,000 aforesaid, it has treated and admitted such sum as owing by it to creditors of the railway company who were such at the date of the Matheson-Palmer agreement, but it denies on information and belief that it has treated and admitted such sum of $217,000, or any part thereof as owing by it to the construction company, and it alleges that the creditors for whose benefit the said sum of $217,000 was received by it did not include the construction company. It admits that substantially all of the creditors of the railway
51 company who were such at the date of the said Matheson-Palmer agreement have been fully paid. Upon information and belief, it denies that the construction company was at the date of the Matheson-Palmer agreement a creditor of the railway company, and it alleges that the said fund of $217,000 was not received by it for the purpose of paying any part thereof to the construction

company. It admits that neither the construction company nor the plaintiff, as assignee of the construction company, has ever been paid by it any part of the said fund of $217,000.

It has no knowledge or information sufficient to form a belief as to whether certain notes made by the railway company and endorsed by the construction company were outstanding on October 15, 1886, or whether such notes were paid out of the proceeds of certain securities belonging to the construction company thereafter sold.

Tenth. It denies upon information and belief that of the said sum of $217,000 there remains to liquidate the indebtedness of the railway company after the payments aforesaid, and in excess of any unpaid amounts which were owing by the railway company at the date of the Matheson-Palmer agreement, and which are still owing, a sum exceeding $111,454.28, with interest thereon from October 15, 1886.

Eleventh. It has no knowledge or information sufficient to form a belief whether, after the happening of all the matters set up in the complaint, and before the commencement of this action, the construction company duly or otherwise assigned, transferred and set over unto the plaintiff, the alleged cause of action set forth in the first ten paragraphs of the said complaint, and all the alleged claims of the construction company against the defendant, arising out of the provisions of the said Matheson-Palmer agreement, with
52 reference to the said fund or sum of $217,000 mentioned therein as aforesaid, or made any of the transfers or assignments mentioned in the paragraph of the said complaint marked XI.

Twelfth. And for a further and separate defense to the first alleged cause of action, the defendant alleges upon information and belief that it has paid to creditors of the railway company other than the construction company the whole of the said sum of $217,000, except the sum of $57,190.44; that no part of this said sum of $57,190.44 will probably be required to pay any other creditors of the railway company or for any of the purposes for which the said sum of $217,000 was received by the defendant, and that such balance of the said sum of $217,000, namely, the sum of $57,190.44, is under the said Matheson-Palmer agreement properly to be added to the capital reserve mentioned in said agreement.

Thirteenth. And for a further and separate defense to the first alleged cause of action this defendant alleges, upon information and belief, that if it shall be found in this action that the construction company had upon the 15th day of October, 1886, a just claim for the sum of $111,451.28, or any part thereof, and that the said sum of $217,000 was received by the defendant for the purpose of applying the same to the payment of the creditors of the railway company, including the construction company, nevertheless the balance of the said sum of $217,000, after payment by the defendant thereout of the claims of creditors of the railway company other than the construction company, is the sum of $57,190.44 only.

Fourteenth. And for a further and separate answer to the first

alleged cause of action, and by way of counter-claim, the defendant, upon information and belief, repeats all the allegations here-
53 inbefore contained in relation to the first alleged cause of action, and further alleges that if it shall be found in this action that the construction company had on October 15, 1886, a just claim against the said railway company for the sum of $111,451.28, or any part thereof, and that the said sum of $217,000 was received by the defendant for the purpose of applying the same to the payment of the creditors of the said railway company, including the construction company, and that the plaintiff is the owner of the claims against the defendant by reason of the premises, nevertheless the whole balance of the said sum of $217,000, after payment by the defendant thereout of the claim of the creditors of the railway company other than the construction company, is the sum of $57,190.44 only, and by reason of the transactions between the defendant and the construction company since October 15, 1886, the construction company is now indebted to the defendant in the sum of $59,329.54 for moneys paid by the defendant to the construction company, or for its use and benefit; for moneys of the defendant retained by the construction company and for the reasonable worth of property of the defendant used by the construction company, which sum of $59,329.54, with interest thereon, in the contingencies mentioned in this paragraph of this answer, the defendant seeks to have allowed as a counter-claim to the extent of such demand of the plaintiff.

In answer to the second alleged cause of action the defendant alleges, upon information and belief, as follows:

I. The defendant repeats all the allegations hereinbefore contained relating to the first alleged cause of action.

II. It admits that it received the aforesaid sum of $217,000 in or about the latter part of the year 1887, pursuant to the Matheson-Palmer agreement as hereinbefore stated, but it denies that after such
54 receipt of said sum the construction company requested payment by the defendant of the said sum of $111,454.28 with interest from the 15th day of October, 1886. It denies that it promised in pursuance and in consideration of the Matheson-Palmer agreement or otherwise to pay to the construction company so much of the said alleged claim of the construction company as should have been owing by the railway company to the construction company on October 15, 1886, and as the portion of the said fund of $217,000 remaining after deducting therefrom the amount due other creditors would pay. It admits that on or about April 14, 1890, it entered into a certain agreement of arbitration with the construction company, and that the paper annexed to the complaint as a copy of such arbitration agreement is a correct copy thereof.

III. It admits that after the making of the said arbitration agreement, the construction company and the defendant proceeded from time to time with the hearing and taking of testimony before the arbitrators therein named, and that until the breach of said arbitration agreement by the construction company hereinafter set forth, the said construction company fully performed the said agreement.

It admits that upon further agreement between the defendant and the construction company, the time limited by the arbitration agreement for the completion of the arbitration was from time to time extended beyond the three months after the 25th day of April, 1890, mentioned in the said arbitration agreement to successive respective days certain, the last extension to a day certain being until the first day of July, 1891. It admits that on or about the 8th day of June, 1891, Treadwell Cleveland, the arbitrator upon the said arbitration named by the defendant, was engaged in the conduct of a trial, which conduct was claimed by him and the defendant to prevent his conveniently proceeding with the
55 said arbitration. It admits that the defendant then asked the construction company to agree to a suspension of the proceedings upon the said arbitration, and that on or about the 8th day of June, 1891, a stipulation was made between the construction company and the defendant that further proceedings upon said arbitration should be suspended until five days after the conclusion of the said trial in which the said Cleveland was engaged, and that then and thereafter the hearings on the arbitration should proceed *de die in diem* (meaning from day to day) until the conclusion of the said arbitration, the hours to be from two until five o'clock each day except Sundays; that thereafter and on or about the 16th day of July, 1891, the defendant served upon the arbitrators a notice, a copy of which is annexed to the said complaint as a part thereof, and entitled "Defendant's notice of revocation of arbitration," and that thereupon and thereafter the defendant wholly refused to proceed with the arbitration. It denies that it otherwise refused to perform the said agreement, and it denies that it in all respects broke and violated the said agreement. It denies that such revocation of the arbitration was without right or excuse on its part, and it alleges that such revocation was in all respects justifiable, and was caused solely by the said construction company insisting that matters not included in the said arbitration agreement should be submitted to said arbitrators, and that if it had not been for this breach of the said arbitration agreement by the construction company it was ready and willing to proceed with the said arbitration and would have done so, and it denies that the construction company suffered damages in the sum of $1,731, or any other sum, by reason of any breach of the said arbitration agreement by the defendant.

IV. It admits that on or about the 20th day of August,
56 1891, the construction company did pay to the Hon. Charles S. Fairchild, being one of the arbitrators named in the said arbitration agreement, the sum of $1,250, and that such sum was one-half of the reasonable value of the services of the said Fairchild as arbitrator, but it denies that the benefit of such payment was wholly lost to the construction company by reason of the defendant's breach of the said agreement of arbitration, and it alleges that any loss the said construction company may have suffered in the premises was due and owing to its own wilful breach as aforesaid of the said arbitration agreement.

V. It admits that in the proceedings before the said arbitrators, the construction company incurred, as a necessary and proper expense thereof, and did pay, on or before the 20th day of August, 1891, the further sum of $481, for stenographer's fees and for printing the record of the proceedings before the arbitrators.

VI. It denies that the construction company sustained damage by reason of the breach by the defendant of the said agreement of arbitration in the sum of $1,731 (which amount is the aggregate of the two aforesaid sums of $1,250 and $481), or in any other sum.

VII. It has no knowledge or information sufficient to form a belief as to whether after the 20th day of August, 1891, and before the commencement of this action, or at any other time, the construction company duly or otherwise assigned, transferred or set over to the plaintiff all the claim of the construction company against the defendant, referred to in the said agreement of arbitration, and all alleged right or rights of action under the said agreement of arbitration, or of any and every claim of the construction company against the defendant arising out of the said agreement of arbitration or alleged breach thereof, or made any of the
57 other assignments or transfers mentioned in the paragraph of the said complaint relating to the second alleged cause of action, marked VII.

VIII. And for a further and separate answer to the second alleged cause of action and by way of counter-claim, the defendant, upon information and belief, repeats all the allegations hereinbefore contained in relation to the first alleged cause of action, and further alleges that if it shall be found in this action that the defendant broke or violated the said arbitration agreement, and that the construction company or the plaintiff suffered any damage thereby, and that the plaintiff is the owner of the claims against the defendant by reason of such breach of the said arbitration agreement, the construction company by reason of transactions between it and the defendant since October 15, 1886, is indebted to the defendant in the sum of $59,329.54 for moneys paid by the defendant to the construction company or for its use and benefit; for moneys of the defendant retained by the construction company and for the reasonable worth of property of the defendant used by the construction company, which sum of $59,329.54 in the contingencies mentioned in this paragraph of this answer, the defendant seeks to have allowed as a counter-claim to the extent of such demand of the plaintiff.

Wherefore, the defendant prays that the said complaint may be dismissed, with costs.

EVARTS, CHOATE & BEAMAN,
Def't's Att'ys.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, William G. Raoul, being duly sworn, depose and say as follows: I am the president of the defendant herein, The Mexican National Railroad Company. I have read the foregoing answer

and know the contents thereof, and the same is true of my
58 own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

W. G. RAOUL.

Sworn to before me this 7th day of January, 1892.

JOSEPH IMMERMAN,
[L. S.] *Notary Public, New York County.*

59 UNITED STATES OF AMERICA, } ss:
Second Circuit, }

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The Mexican National Railroad Company, plaintiff in error, *vs.* Joseph A. Davidson, defendant in error, was duly filed and entered of record in my office by order of said court on the twentieth day of December, 1894, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 20th day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED,
Clerk United States Circuit Court of Appeals for the Second Circuit.

60 [Endorsed:] U. S. circuit court of appeals, second circuit. The Mexican National Railroad Company, pl'ff in error, *vs.* Joseph A. Davidson, def't in error. Certificate.

61 Supreme Court of the United States.

JOSEPH A. DAVIDSON, Plaintiff in Error,
against
THE MEXICAN NATIONAL RAILROAD COMPANY. } No. 876.

THE MEXICAN NATIONAL RAILROAD COMPANY, Plaintiff in Error,
against
JOSEPH A. DAVIDSON. } No. 880.

It is hereby stipulated that the clerk shall print the record of either one of the above causes, and that the record so printed shall be considered the record in both causes.

Dated New York, January 19th, 1895.

TREADWELL CLEVELAND,
Of Counsel for R. R. Co.
EDWARD M. SHEPARD,
Of Counsel for Davidson.

62 [Endorsed:] Case- No. 15,760 & 15,764. Supreme Court U. S., October term, 1894. Term Nos., 876 & 880. Joseph A. Davidson, P. E., *vs.* The Mexican National R. R. Co. and The Mexican National R. R. Co., P. E., *vs.* Joseph A. Davidson. Stipulation that but one record be printed and considered the record in both cases. Filed Jan'y 21, 1895.

Endorsed on cover: Case No. 15,764. U. S. circuit court of appeals, second circuit. Term No., 880. The Mexican National Railroad Company, plaintiff in error, *vs.* Joseph A. Davidson. Certificate. Filed January 5th, 1895.

157-201

157-201

Office Supreme Court, U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE MEXICAN NATIONAL RAILROAD COMPANY,
Plaintiff in Error,
against
JOSEPH A. DAVIDSON,
Defendant in Error.

On Certificate No. 880.

JOSEPH A. DAVIDSON,
Plaintiff in Error,
against
THE MEXICAN NATIONAL RAILROAD COMPANY,
Defendant in Error.

On Certificate No. 876.

ARGUMENT FOR THE MEXICAN NATIONAL RAILROAD COMPANY.

TREADWELL CLEVELAND,
Of Counsel for the Railroad Company.

Supreme Court of the United States.

THE MEXICAN NATIONAL RAILROAD COMPANY, Plaintiff in Error, AGAINST JOSEPH A. DAVIDSON, Defendant in Error.	On Certificate. No. 880.
JOSEPH A. DAVIDSON, Plaintiff in Error, AGAINST THE MEXICAN NATIONAL RAILROAD COMPANY, Defendant in Error.	On Certificate No. 876.

Argument for The Mexican National Railroad Company.

The statements of facts contained in the certificates herein made by the Judges of the United States Circuit Court of Appeals for the Second Circuit show that on September 11, 1891, The Mexican National Construction Company, *a citizen of Colorado*, assigned its causes of action against The Mexican National Railroad Company, *also a citizen of Colorado*, to Davidson, a citizen of New York; that on the same day Davidson began this action by attachment in the Supreme Court of the State of New York, and that in due season the Railroad Company removed the cause into the United States Circuit Court for the Eastern District of New York.

The plaintiff Davidson recovered a judgment for

$151,832.41 after a trial before the Court without a jury.

From this judgment the Railroad Company sued out its writ of error. The plaintiff Davidson also sued out a writ of error on the ground that in addition to the amount of $40,000, in promissory notes made by the Railway Company, payable to the order of the Construction Company, the face value of which notes was included in the judgment, he should have had judgment for $40,000 additional by reason of the alleged loss of certain shares of stock pledged as collateral for the payment of said notes for $40,000, which shares of stock it was claimed were worth $40,000.

On the trial a stipulation was made which is annexed hereto as Appendix B. Under this stipulation the plaintiff claimed to recover and was allowed to recover the face value of the said promissory notes for $40,000. These notes are mentioned in the complaint, Certificate, folio 13.

The Circuit Court of Appeals certified the questions of jurisdiction on the writ of error taken by the plaintiff as well as on that taken by the Railroad Company. By stipulation between counsel but one certificate has been printed, as the same questions of jurisdiction are involved on both writs and on each certificate.

The two causes of action set up in the complaint are:

First.—A cause of action to recover $111,454.28 and interest for alleged work, labor and services performed and materials furnished by The Mexican National Construction Company, the assignor of Davidson, on the employment of The Mexican National *Railway* Company, a citizen of Colorado, the debt arising from which work, labor and services, and materials furnished, the defendant The Mexican National *Railroad* Company is stated to have agreed to pay (fol. 2 and Complaint).

Second.—A cause of action to recover the sum of $1,731 alleged damages sustained by The Mexican

National Construction Company, being the amount of its payments on account of the reasonable fees of an umpire and stenographer upon proceedings under an arbitration agreement between the Construction Company and the Railroad Company, which arbitration agreement, it is alleged, was wrongfully revoked by the Railroad Company (fol. 3 and Complaint).

The arbitration agreement was annexed to the complaint and made a part thereof (fol. 15 of the Certificate). By some omission it has not been printed in the record, but a copy is printed at the end of this argument.

Two questions arise for the consideration of this Court under each of the causes of action mentioned in the complaint.

A. Could the Circuit Court of the United States have entertained original jurisdiction of the cause?

B. Could this action be removed into the United States Circuit Court from the State Court?

These questions thus presented require a construction of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, defining the jurisdiction of District and Circuit Courts of the United States.

The act is as follows (Act August 13, 1888, Vol. 25, U. S. St. L., Chap. 866):

> SEC. 1. "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity * * * in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value (of two thousand dollars) * * * and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is

> founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; * * *
>
> Section 2. * * * Any other suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being nonresidents of that State." * * *

The first cause of action is brought to recover an indebtedness of $104,244.10, with interest of $7,210.18, amounting to $111,454.28 (Complaint, fol. 8), which it is alleged the accounts of the two Colorado corporations show to have existed on October 1, 1886, in favor of the Construction Company and against the Railway Company. If such an indebtedness existed at that time, it arose from the performance of work, labor and services by the Construction Company for the Railway Company and which the Railway had not paid, that is, for which it was indebted upon contract, either express or implied, that is in assumpsit.

The present defendant, the Rail*road* Company, however, was not a party to this contract, but its obligation to pay this alleged debt, if any exists, arises from an agreement called the Matheson-Palmer agreement. This agreement, annexed to the complaint, was made between the Englishmen to whom the Construction Company had disposed

of the first mortgage bonds of the Railway Company and the Construction Company. In brief, it provided for a friendly foreclosure of the mortgage upon the property of the Railway Company and the formation of a new railroad company under the laws of Colorado; the conveyance of the property bid in at foreclosure sale to such new company; the issue of new first mortgage bonds by the new railroad company; the sale of these to a certain amount, and from the proceeds of such sale of new first mortgage bonds the deposit with the new railroad company of "a sum not exceeding $217,000, to be applied to liquidate the indebtedness of the existing railway company," that is, The Mexican National Railway Company (fols. 18 to 25).

The complaint sets forth the agreement; the sale of the property of the Rail*way* Company; the formation of the defendant The Mexican National Railroad Company, under the laws of Colorado, as the new company; the issue and sale of the new first mortgage bonds; the deposit with the defendant of the said sum of $217,000 as a part of the proceeds of these bonds, and alleges that "of the said sum of $217,000 there remains, to liquidate the indebtedness of the Railway Company, * * * a sum exceeding $111,454.28, with interest thereon from the 15th day of October, 1886" (fol. 13), and for this sum of $111,454.28 and interest the complaint demands judgment (fol. 17).

The theory of the action, it thus appears, is that by virtue of the Matheson-Palmer agreement and the receipt by the Rail*road* Company of the property of the Rail*way* Company, the Rail*road* Company became liable to pay the debt of the Rail*way* Company.

The real issue on the merits is, therefore, whether the Construction Company is entitled to recover its claim of $111,454.28 against the Railroad Company out of the fund of $217,000 provided for in the Matheson-Palmer agreement. These circumstances it is conceived make the Construction Company and

the Railroad Company either parties to an express contract which it is attempted to interpret and enforce in this action, but if not that, then to an obligation implied in law under the circumstances of the receipt by the Rail*road* Company of the property of the Rail*way* Company and of the said sum of $217,000.

First Point

The first cause of action is one brought "to recover the contents of a chose in action," and could not have been originally brought in the Circuit Court of the United States.

(*A.*) The Circuit Courts of the Uuited States have never had original jurisdiction of such an action.

(I.)—The language of that part of the Judiciary Act of 1789, bearing on this subject is as follows:

§ 11. * * * "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents if no assignment had been made." * * *

The first decision of this Court on the proper construction of the language of this act is in Sere *vs.* Pitot, 6 Cranch., 332 (1812):

This was an action commenced in the District Court for the District of New Orleans to foreclose a mortgage given by the defendant, a citizen of Louisiana, to another citizen of the same State. The plaintiff was the general assignee in insolvency of the mortgagor and was an alien.

Chief Justice Marshall, writing the opinion of the Court, says:

> "Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the Legislature when the law was framed, and the words of the provision are therefore best adapted to that class of assignments; but there is no reason to believe that the Legislature were not equally disposed to except from the jurisdiction of the Federal Courts, those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity in his own name, and there would be as much reason to exclude him from the Federal Courts as to exclude the same person when the assignee of a particular note. The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The contents of a note are the sum it shows to be due, and the same may, without much violence to language be said of an account."

Since 1812 there has been no limitation of this determination by this Court.

Sheldon *vs.* Sill, 8 How., 441 (1850), was a Bill in Equity in the Circuit Court of the United States by the assignee of a bond and mortgage for a decree compelling the sale of the mortgaged premises. The mortgagor and mortgagee were both citizens of Michigan, and the assignee, the plaintiff, was a citizen of New York. It was held that the Court had no jurisdiction, Mr. Justice Grier saying:

> "The term 'chose in action' is one of a comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action."

In the case of Deshler *vs.* Dodge, 18 How., 622 (1853), it was held that an action of replevin was not within the definition "action to recover the contents of a chose in action."

In Bushnell *vs.* Kennedy 9 Wall., 387, (1869), it was held that an action to recover a debt for money loaned was an action to recover the contents of a chose in action. Chief Justice Chase, in delivering the opinion of the Court, said:

> "That the indebtedness of Bushnell to Mills and Frisby was a chose in action cannot be doubted, for under that comprehensive description are included all debts and all claims for damages for breach of contract or for torts connected with contract; nor can it be denied that every suitor who brings an action in the Court of the United States must aver in his pleadings a state of facts which, under the National Constitution and laws gives to the Court jurisdiction of his suit."

In Corbin *vs.* County of Black Hawk, 105 U. S., 659 (1881), the plaintiff, a citizen of New York, in 1874 commenced his action in the United States Circuit Court for the specific performance of a contract to convey land made by the defendants, citizens of Iowa, with the plaintiff's assignor, another citizen of Iowa. It was held that the Circuit Court had no jurisdiction. Mr. Justice Blatchford, writing the opinion of the Court, said:

> "The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a

> contract as a chose in action, in the sense of Section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract, and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money stipulated in these contracts to be paid by the purchasers, as a foundation for their right to receive patents is, so far as this suit is concerned, the essence of the contracts, and a suit to compel the acceptance of that money is a suit to enforce such promise, and therefore is a suit to recover the contents of the contracts."

Shoecraft *vs.* Bloxham, 124 U. S., 730 (1887), was an action commenced while the Act of 1789 was in force. A deed of trust in the nature of a mortgage set out in full the contract between the mortgagor and certain parties for the conveyance of certain parcels of land to him, and then conveyed to the mortgagee all the right, title and interest which he, the mortgagor, had or might thereafter acquire in and to the lands embraced in the contract. It was held that the Circuit Court had no jurisdiction, because the plaintiff's assignor and the defendant were both citizens of Florida. Mr. Justice Field, delivering the opinion of the Court, says:

> "This conveyance * * * was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the land covered by the contract are concerned, is worthless as a security. If he has no interest in the contract, he has no standing in Court to ask its enforcement; and if he is to be regarded as an assignee of

> the contract under the deed of trust, he is disabled from maintaining the suit in the Circuit Court by Section 629 of the Revised Statutes; he is subject to the same disability in that respect as the assignor."

(2.) The language of the Act of 1875, making many changes in the jurisdiction of the Circuit Courts, both as to what actions could be brought therein and what could be removed thereto is, as far as the present point now under discussion is concerned, as follows:

> "SEC. 1. * * * * * nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange "
>
> "SEC. 2. Any suit of a civil nature at law or in equity now pending or hereafter brought in any State Court * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

This action is an action on contract, either express or implied, but as the Act of 1887-8 restores the language of the Judiciary Act it is not now important to consider this Act of 1875, and therefore the cases on this point where the action was commenced while the Act of 1875 was in force are not cited.

(3.) Section 1 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, uses, however, the language of the original Judiciary Act of 1789, above quoted.

The decisions under the judiciary award are therefore directly in point. The following additional cases, determined by this Court, are cited.

Plant Investment Co. *vs.* J. T. & K. W. Rwy. Co., 152 U. S., 71 (1894):

This was a bill in equity filed in the Circuit Court of the United States to enforce the conveyance of certain lands in Florida which the trustees of a certain fund belonging to the State had agreed to convey to the defendant, and which the defendant, before receiving the conveyance, had agreed to convey to the plaintiff in consideration of its construction of the defendant's railroad. The bill made the trustees of the State fund and the railroad, parties, and prayed that the trustees be compelled to convey the land to plaintiff. It was held that the Circuit Court of the United States had no jurisdiction of the action, because it was an action to recover the contents of a chose in action. Mr. Justice Field, delivering the opinion of the Court, says:

> "The contract between the trustees of the Internal Improvement Fund of Florida and the defendant Railroad Company, being a contract between citizens and residents of the same State, could not be enforced by suit in a Federal Court. The complainant, the Plant Investment Company, claims the benefit of that contract and seeks to have it enforced for its benefit. It occupies, in fact, the position of assignee of that contract, its only right to the lands depending upon its validity, but it cannot enforce the contract in the Federal Court because, by Section 629 of the Revised Statutes, it is provided that no Circuit Court shall have cognizance of any suit to recover the content of any promissory note or other chose in action in favor of an assignee unless the suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the same provision is contained in the Act of March 3, 1887, Chapter 373, 24 Stat., 552, amendatory of the act to determine the jurisdiction of the Circuit Court of the United States."

New Orleans *vs.* Benjamin, 153 U. S., 411 (1894).

The City of New Orleans was indebted to an organization called the Police Board of the City of New Orleans on account of taxes assessed and collected for the board. The board became indebted to Benjamin, an alien, for work and materials. In this situation the board was abolished, and Benjamin sued the city in the Circuit Court of the United States, and prayed that he and the other creditors of the board might receive such sums as were due to the board from the city, and as he alleged, not to recover on the contract or debt between the city and the board, but "to establish a fund" and to prove a claim to a proportionate part of the fund. It was held that this was an action to recover the contents of a chose in action by the assignee, and hence the Circuit Court had no jurisdiction. Mr. Chief Justice Fuller, delivering the opinion of this Court, says:

> "Although it is ingeniously said that the suit is one to 'establish a fund,' this does not change the fact that it is a suit to recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is in this instance only another name for the ascertainment of an indebtedness of the city to the board available to the creditors of the board after their claims as such are judicially determined. * * * In our judgment the pleadings show a suit to recover the contents of choses in action, and as the bill contained no averment that it could have been maintained by the assignors if no assignments had been made (from the statement accompanying the certificate it appears affirmatively that it could not), the jurisdiction of the Circuit Court cannot be sustained on the ground of diverse citizenship."

By the repeated and uniform decisions of this Court, it thus clearly appears that the words "action to recover the contents of a chose in action"

include all the common law actions of covenant, debt and assumpsit, both general and special. The distinction seems to be between actions founded on tort, such as trespass (Ambler *vs.* Eppinger, 137 U. S., 480) and replevin (Deshler *vs.* Dodge, *supra*), and actions founded on obligations *ex contractu.*

Whatever be the true nature of the claims in controversy, they are certainly not actions founded on tort; they are actions which are based on contracts, and therefore this suit as to the first cause of action and as to the second cause of action is within the definition given to those words by the Courts, " an action to recover the contents of a chose in action."

It is therefore clear that under the Act of 1887-8, as the language used by it has been uniformly interpreted by the decisions of this Court since 1812, this action could not have been brought originally in a Circuit Court of the United States, by Davidson, the assignee of a Colorado corporation against a Colorado corporation.

Second Point.

The first cause of action is one of which the Circuit Courts of the United States cannot take cognizance through removal from a State Court.

(*A.*) That the Act of 1887 was intended to contract the jurisdiction of the Circuit Courts of the United States, whether original over suits brought therein or by removal from the State Courts, can no longer be questioned.

In Smith *v.* Lyon, 133 U. S., 315, 319 (1889), it is said by Mr. Justice Miller:

> "The statute which we are now construing leaves out the provision that if a party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process.

> The omission of these words and the increase of the amount in controversy necessary to the jurisdiction of the Circuit Court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the State Courts to those of the United States, and many other features of the new statute, show the purpose of the Legislature to restrict rather than to enlarge the jurisdiction of the Circuit Courts. * * *
>
> It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over ninety years by this Court, intended that that language should be given a construction which would enlarge the jurisdiction of those Courts and which would be directly contrary to that heretofore placed upon it by this Court."

In Shaw *v.* The Quincy Mining Co., 145 U. S., 444 (1891), it is said by this Court (Mr. Justice Gray writing the opinion):

> "That the general object of this act (the Act of 1887), as appears upon its face and as has been often declared by this Court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States;"

In the most recent case on the subject, Hanrick *v.* Hanrick, 153 U. S., 192 (1893), this Court again said through Mr. Justice Gray:

> "The Act of March 3, 1887, Chapter 373, corrected by the Act of August 13, 1888, Chapter 866, was intended, as this Court has often recognized, to contract the jurisdiction of the Circuit Courts of the United States, whether original over suits brought therein or by removal from the State Courts."

See also

Re Pennsylvania Company, 137 U. S., 451, 454.

Fiske *v.* Hennerly, 142 U. S., 459, 467.

(*B.*) The Circuit Courts having only such jurisdiction as is expressly conferred upon them by act of Congress, a plaintiff in the Federal Courts must show that his action is one of which the Federal Courts have been expressly given jurisdiction. Section 1 of Act March 3, 1887, in its first part, confers jurisdiction on Circuit Courts of all actions between citizens of different States involving more than a certain amount. Then follows this provision:

"Suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It has been held that this restriction is a personal privilege of a defendant and can be waived by appearing and pleading to the merits.

See

Short *v.* Chicago, M. & St. P. Ry. Co., 34 Fed., 225. C. C., D. Minn. (1888).

Wilson *v.* Western Union Tel. Co., 34 Fed., 561. C. C., D. Cal. (1888).

Kansas City & T. R. Co. *v.* Interstate Lumber Co., 37 Fed., 3. C. C., W. D. Mo. (1888).

Amsinck *v.* Balderson, 41 Fed., 641. C. C., D. R. I. (1889).

But these decisions do not involve a consideration of the jurisdiction of United States Courts as such. The question of Federal jurisdiction is a fundamental question. A party cannot by any act confer jurisdiction or waive his right to object at any point that the Court had no jurisdiction of the action.

The last part of Section 1 contains the provision under examination, which is:

> "Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of an assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made."

Section 2 of the Act of 1887 reads as follows:

> "Any other suit of a civil nature at law or in equity of which the Circuit Courts of the United States are given jurisdiction *by the preceding section*, and which are now pending or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

It would seem that this language of the statute, as far as it is necessary to examine it to reach a determination of the questions here in issue, is not easy of misconstruction.

The second section of the act provides in what apparently are plain terms, that it is only a suit of which the Circuit Courts of the United States are given jurisdiction by the first section of the act, which may be removed into the Circuit Court of the United States under the 2d section. And as the Circuit Courts of the United States are courts of limited jurisdiction, and have only such jurisdiction as has been expressly conferred upon them by the first section of the act it would appear to be plain that no cause can be removed into the Circuit Courts of the United States, of which those Courts are not given jurisdiction by the first section of this act.

The provision, in the latter part of the first section, providing that the Circuit Court of the United States shall not have jurisdiction of assigned causes of action, unless the assignor could sue, is wholly different from the preceding provision respecting the proper district in which suit may be brought. This latter part of the first section of the act is a limitation on the jurisdiction of the Federal Courts as such. It therefore diminishes the jurisdiction given in general terms in the first part of the section. This section, thus, in effect, gives to the Circuit Courts jurisdiction of only those suits upon choses in action in which the plaintiff and all

under whom he claims are citizens of another State than the defendant. The requisite diversity of citizenship, to give the Federal Courts jurisdiction, must have existed between the defendant and each successive holder of the chose in action in suit. It follows, therefore, that the defendant cannot waive his rights to object to the jurisdiction. This has been the settled law since

Capron *vs.* Van Noorden, 2 Cranch, 126, decided in 1804.

See the case of

Mansfield, &c., Railroad *v.* Swan, 111 U. S., 379 (1884), where the whole subject is reviewed.

Hartog *v.* Memory, 116 U. S., 588 (1886).

In Ayers *vs.* Watson, 113 U. S., 594, decided in 1885, the defendant Ayers had removed the case to the Circuit Court, and then raised the point that the Circuit Court had no jurisdiction because his petition to remove had been filed too late. Held, this requirement had been waived.

Mr. Justice Bradley says:

> "By Section 2 of the Act of 1875 any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dispute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which the United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district, and when in any such suit there is a controvery wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to

> the Circuit Court of the United States for the proper district. This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By Section 3 it is provided that a petition must be filed in the State Court before or at the term at which the cause can be first tried and before the trial thereof for the removal of the suit into the Circuit Court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. R. R. Co. *v.* Swan (*ante*, 462). Application in due time and the proffer of a proper bond, as required in the third section, are also essential if insisted on; but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication."

In Metcalf *v.* Watertown, 128 U. S., 586 (1888), it was held that an assignee of a judgment founded on a contract suing in a Circuit Court of the United States on the ground of citizenship, cannot maintain the action unless it appears in the record that both the plaintiff and his assignor were not citizens of the same State with the defendant. This action was originally brought in a Circuit Court. The defendant appeared and pleaded to the merits, and a judgment was rendered on the merits.

Mr. Justice Harlan, delivering the opinion of the Court, said:

> "Although the question of the jurisdiction of the Circuit Court over the present suit was suggested at the bar, the case was argued entirely with reference to (the merits of the case). * * * By the very terms, therefore, of the statute, Metcalf's right to sue in the Circuit Court depends upon the right of his assignors to have brought suit in that Court if no assignment had been made. This view is fatal to the jurisdiction of that Court so far as its jurisdiction depends upon the above provision of the statute, because it nowhere appears in the record of what State the plaintiff's assignors were citizens when this action was commenced. Indeed, it is consistent with the record that they were at that time citizens of the same State with the defendant."
>
> See also Morris *v.* Gilmer, 129 U. S., 315.

(*C.*) Section 11 of the Judiciary Act (1789) defined the jurisdiction of the Federal Courts over actions brought there originally.

Section 12 provided for the removal of cases into the Federal Courts from State Courts, and reads as follows:

> "That if a suit be commenced in any State Court * * * by a citizen of the State in which the suit is brought against a citizen of another State * * * and the defendant shall at the time of entering his appearance at such court file a petition for the removal of the cause for trial into the United States Circuit Court" (such cause shall be so removed).

Section 1 of the Act of March 3, 1875, corresponds to Section 11, and Section 2 of the Act of 1875 corresponds to Section 12 of the Judiciary Act, and reads as follows:

> "Any suit of a civil nature at law or in equity now pending or hereafter brought in

> any State Court * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court."

The provisions in Sections 12 and 2 in these two acts respectively are independent of Sections 11 and 1 respectively, and under them it has been held that the question of removal from State Courts to Federal Courts must be determined irrespective of whether the action in question could have been originally brought in the Circuit Courts.

Sections 12 and 2 respectively contain no reference to Sections 11 and 1, and the grant of jurisdiction over removed actions is general. In neither Section 12 of the Judiciary Act nor in Section 2 of the Act of 1875 is there any exception from the jurisdiction of the Circuit Courts of actions upon assigned choses in action, such as is contained in Sections 11 of the Act of 1789 and 1 of 1875 respectively; and since none is introduced into these sections by reference to the preceding sections, it follows that the jurisdiction of Circuit Courts of actions removed under the Acts of 1789 and 1875 from State Courts on the ground of citizenship, depends wholly upon the citizenship of the parties to the action. This was the reason for the decisions in the cases of Bushnell *v.* Kennedy, 9 Wall., 387, and Claflin *v.* The Comm. Ins. Co., 110 U. S., 81. In each of these cases, however, the Court argued at some length to reach the conclusion that while the exception from the jurisdiction of assigned choses in action contained in the prior section was not expressly or by reference contained in the removal section, that it was not necessarily implied, and in each case although unwillingly in the latter, the Court came to the conclusion that the Circuit Court had under the Act of 1875 jurisdiction of an action on an assigned chose in action by removal, although it would not have had jurisdiction in such case by original process.

With a view to remove the difficulty felt by the Court, Congress passed the Act of March 3, 1887, which provides that no suit can be removed into a Circuit Court which could not originally have been brought in that Court.

> "That any suit of a civil nature at law or in equity * * * of which the Circuit Courts of the United States are given original jurisdiction *by the preceding section* * * * may be removed by the defendant or defendants therein to the Circuit Court of the United States."

Since a failure on the part of Congress to confer jurisdiction expressly is equivalent to an express denial of jurisdiction to the Circuit Courts, when Congress said "of which the Circuit Courts are given jurisdiction by the preceding section," the effect is the same as it would have been if Congress had added the words "and of no other actions."

By Section 2 of the Act of 1887 Circuit Courts are given jurisdiction of such cases brought there by removal on motion of the defendant from a State Court, as they are given jurisdiction of by original process in the first section, and of no others. Hence the exception from the jurisdiction of Circuit Courts of "actions to recover the contents of a chose in action," is imported into the second section by express reference.

Since this radical difference exists between Section 2 of the Act of 1887 and Sections 12 and 2 of the Acts of 1789 and 1875 respectively, it is submitted that no case which was commenced prior to the Act of 1887 should have much weight as an authority in determining what actions can now be removed into the Federal Courts.

Parker *v.* Ormsby, 141 U. S., 81 (1891). There it was held in a suit by the assignee of a promissory note payable to the order of the payee: 1st, that where the jurisdiction of the Circuit Court depends upon the citizenship of the parties, it must appear

affirmatively in the record that the payee could have maintained the action on the same ground; 2d, that a party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that Court so as to prevent its being raised and passed upon in this Court.

Mr. Justice Harlan, delivering the opinion of the Court, says:

> "The appellee moved to dismiss the appeal. * * * This motion has been met with one by the appellants that (&c.) * * * or that the action be dismissed for want of jurisdiction in the Circuit Court.
>
> The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts or by failing to act to waive the question of the jurisdiction of the Circuit Court. This is an error. We said in Metcalf *vs.* Watertown, above cited, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here upon error or appeal, is a question that this Court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits."

While the case last cited and the case of Metcalf *vs.* Watertown (*ubi supra*), are cases which the Circuit Courts heard upon original process and not on removal from State Courts, yet they are authorities for the proposition that this provision respecting actions on assigned choses in action is a provision which parties cannot waive, but which determines the jurisdiction of Federal Courts as such.

The above cases of Parker *vs.* Ormsby and Metcalf *vs.* Watertown and Morris *vs.* Gilmer hold that where the action was commenced in the Circuit Court by original process, the defendant may raise the point in the appellate court that the trial court had no jurisdiction by reason of the exception to Federal jurisdiction contained in Section 1, which is now under discussion, although a trial on the merits has been had and a judgment obtained against him.

In view of the principle of the law of procedure that a defendant, by appearing and pleading to the merits, waives all right to object thereafter to the jurisdiction of the Court by reason of any personal privilege, or on any ground but that the court was wholly without jurisdiction of the subject matter of the action, it is difficult to see how the defendant by removing the case to the Federal court waived or lost his right to object in the appellate court and in this court, that the Circuit Court had no jurisdiction under Sections 1 and 2 of the Act of 1887. It cannot well be maintained that moving to have the case removed adds any force to the absolute waiver of personal privileges contained in an appearance and answer to the merits.

The following cases were all commenced in the State Courts and removed under the Act of March 3, 1887, and are cited as containing the true construction of Section 2, the removal section, of that act holding that the Federal courts have no jurisdiction of cases brought there by removal from the State Courts under Section 2 of which they would not have had jurisdiction by original process under Section 1.

Martin's Admrs. *v.* B. & O. R. R., 151 U. S., 673 (1894).

Tennessee *v.* Union, &c., Bank, 152 U. S., 454 (1894).

The latter case was an action commenced in the State Court and removed into the Circuit Court of the United States by the defendant. It was held that the Circuit Court had no jurisdiction.

Mr. Justice Gray says:

> "The same rule applies more comprehensively to the Acts of 1887 and 1888. In Section 1, as thereby amended, the words giving original cognizance to the Circuit Courts of the United States in this class of cases, are the same as in the Act of 1875, except that the jurisdictional amount is fixed at $2,000, and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill

> should show that he asserts a right under the Constitution or laws of the United States; but the corresponding clause in Section 2 allows removals from a State Court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States on removal by the defendant under this section to such suits as might have been brought in that Court by the plaintiff under the first section. The change is in accordance with the general policy of these acts manifest upon their face, and often recognized by this Court to contract the jurisdiction of the Circuit Courts of the United States."

There have been numerous decisions in the United States Circuit Courts favorable to the contention of the defendants. In Laird *v.* Indemnity Mut. Marine Assur. Co. and McNulty *v.* Conn. Mut. Life Ins. Co. (both cited below), the identical question now presented to this Court was decided. And in each case it was held that the Circuit Court had no jurisdiction.

Bentlif *v.* London, &c., Corp., 44 Fed., 667; C. C., S. D. N. Y. (1890):

After having the case removed from the State Court, defendant moved to have the case dismissed on the ground that the State Court had no jurisdiction of the case.

WALLACE, *J.*, said:

> "There are expressions in the case of Sayles *v.* Ins. Co., 2 Curt., 212, and Bushnell *v.* Kennedy, 9 Wall., 387, favorable to the contention for the plaintiff here, and to the effect that a party who has removed a suit from the State Court cannot dismiss it in the Federal Court upon the ground that the State Court did not have jurisdiction of the action. These expressions, however, were unnecessary to the decision of the cases, and since they were reported there have been numerous decisions of Circuit Courts to the contrary."

Laird *v.* **Indemnity Mut. Marine Assur. Co., 44 Fed., 712; C. C., S. D. N. Y., (1890):**

On motion by defendant to remand to the State Court.

The action was commenced in the State Court, and removed to the Circuit Court by defendant.

Held, LACOMBE, *J.:*

> "This is an action to recover upon a contract of reinsurance, and for a reformation of the policy, if necessary. It is, therefore, an action to recover the contents of a chose in action" (Shoecraft *v.* Bloxham, 124 U. S., 730). The plaintiff is an assignee of the chose in action, and as under the authorities he is not within the exception of the first section of the Act of 1887, this Court can have no cognizance of his suit thereon unless such suit might have been prosecuted here if no assignment had been made (Simons *v.* Paper Co., 33 Fed., 193: Newgass *v.* New Orleans, 33 Fed., 196; Rollins *v.* Chaffee Co., 34 Fed., 91; Wilson *v.* Knox Co., 43 Fed., 481). His assignor is an alien corporation, and so is the defendant. No Federal question is involved, and the suit could not have been prosecuted in this Court between the original parties to the contract upon any theory of diverse citizenship, as neither of them is a citizen of any State of the Federal Union.
>
> Under the Act of 1875, it was held that the restriction applicable to original suits by assignees was not applicable in cases brought originally in the State courts and removed thence to a Federal court (Claflin *vs.* Insurance Co., 110 U. S.. 81; Rosenbaum *vs.* Ins. Co., 37 Fed. Rep., 724). This was upon the ground that the exception out of the jurisdiction as to suits begun in the Circuit Courts contained in the [first section] did not by its terms nor by the immediate context apply to suits begun in the State courts and afterwards removed to the Circuit Courts. Under the Act of 1887, however, the second section of which provides for removal of causes when a

> Federal question is not involved, and when no prejudice or local influence appear, is specially restricted to suits 'of which the Circuit Courts of the United States are given jurisdiction by the preceding section,' and by the preceding section [Section 1], such courts are not given jurisdiction of a suit to recover the contents of a chose in action in such a case as this.
>
> There must be a remand to the State Court."

The case of McNulty *v.* Conn. Mut. Life Ins. Co., 46 Fed., 305; C. C., N. D. Ia., 1891, was on motion by defendant to remand.

Action on a policy of life insurance, commenced in the State Court and removed by defendant to the Circuit Court.

Held, SHIRAS, *J.*:

> "Upon the face of the record it appears that the policy of insurance was assigned by Henry T. McNulty to Waller & Duncan, and by them to Edward W. Duncan. The record wholly fails to show the citizenship of said assignors, and therefore it is not made to appear that Duncan could have originally brought this action in the Federal court; in other words, had the administratrix and E. W. Duncan brought this action originally in the Federal court, in order to sustain the jurisdiction it would have been necessary to aver the citizenship of the parties under whom Duncan claimed title, and to show that their citizenship was diverse from that of the insurance company. Under the Act of 1887, as amended by that of 1888, to justify a removal on the ground of diverse citizenship, it must appear that the case is one of which the Federal court could take jurisdiction originally under the provisions of the first section of the act. * * * Duncan holds the policy as assignee, and the record fails to disclose the citizenship of his assignors. As it does not appear that this Court would have had jurisdiction originally over this case it cannot take it by removal, and the motion to remand is therefore sustained."

In Brisenden *vs.* Chamberlin, 53 Fed. Rep., 307, C. C., S. C., (1892), District Judge Simonton says, at page 308:

> "The second section of the Act of 1887 and 1888 permits the removal of a suit of a civil nature at law or in equity only when original jurisdiction has been given to the Circuit Court of the United States of such suit by the first section of that act. * * * The Act of 1789, in conferring jurisdiction on the Circuit Courts of the United States, uses precisely the words of the Act of 1887 and 1888. * * * The Act of 1875 * * * in the removal sections of that act, the language is enlarged and the words 'any suit at law' are used. The Supreme Court decided that under these words a suit could be removed notwithstanding the fact that the Court could not have had original cognizance of it. * * * To reverse—or perhaps we should say, to prevent—such construction in the future the second section of the Act of 1887 and 1888 used the phraseology we have quoted."

Martins, Administrator, against Baltimore and Ohio Railroad Company, 151 U. S., 673, decided February 5, 1894, under the Act of 1887.

Mr. Justice Gray says, at page 688:

> "The *time of filing* a petition for the removal of a case from a State court into the Circuit Court of the United States for trial is not a fact *in its nature essential to the jurisdiction* of the National court under the Constitution of the United States like the fundamental condition of a controversy between citizens of different States. But the direction as to the time of filing the petition is analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, the non-compliance with which is waived by a defendant, who does not seasonably object that the suit is brought in the wrong district."

The opinion cites Ayers *vs.* Watson (cited above) and then proceeds:

> "In that case, it is true, it was the party who had removed the case into the Circuit Court of the United States who afterwards objected to the jurisdiction of that Court because the removal was not in time, and was held to be estopped to do so, *but if due time of removal had been made by the act of Congress a jurisdictional fact neither party could waive or be estopped to set up the want of it, but, as observed by Mr. Justice Bradley in the passage above quoted and directly adjudged in Mansfield* vs. *Swan, cited by him, the fact would be absolutely essential and the want of it would be error at any stage of the cause, even though assigned by the party at whose instance it was committed.* His whole course of reasoning leads up to the conclusion that the time of the removal not being a jurisdictional and essential fact is a subject of waiver and of estoppel alike."

Third Point.

The propositions contended for in the First and Second Points as to the first cause of action, apply to the second cause of action.

(*A.*) This cause of action is to recover $1,731 damages for breach of the written arbitration agreement.

(*B.*) The sum sued for is under the jurisdictional amount, namely, two thousand dollars exclusive of interest and costs.

Fourth Point.

It was the duty of the Railroad Company to itself raise the question of jurisdiction before the United States Circuit Court of Appeals, and it had not waived or lost its right to object to the jurisdiction of the Circuit Court by removal of the suit from the State Court.

(*A.*) The certificate herein correctly states that "the *record* shows that no question as to the jurisdiction of the Circuit Court was raised upon the trial, and no such question is referred to in the findings or opinions of the Circuit Court" (fol. 4).

It is also true that the defendant believing at the time that the Circuit Court had jurisdiction, raised no question on the subject before the trial Court.

The plaintiff, however, instead of moving to remand the cause to the State Court, contended that the Circuit Court had jurisdiction, and discussed the subject before the trial Court in his brief as follows:

> "If objection be made that this action could not have been originally maintained in the Federal Court, for that both the defendant and the plaintiff's assignor were citizens of the same State, namely, Colorado, we first answer by pointing out that this action was originally begun in the Supreme Court of New York, which clearly had jurisdiction of it, and that the defendant removed the action to this Court upon a petition asserting the plaintiff's interest. In the second place, we rest upon the decisions of the Supreme Court in Delaware County *v.* Diebold Safe Co., 133 U. S., 473, and Claflin *v.* Commonwealth Ins. Co., 110 U. S., 81. In this respect there is no difference between the Act of 1875, under which these decisions were made, and the Act of 1887. The language of the former act was:
>
> 'Nor shall any Circuit or District Court have cognizance of any suit founded on

contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.'

The language of the later act is:

'Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory notes or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

In Claflin *v.* Commonwealth Ins. Co., *supra*, the Supreme Court held that the statute did not apply to a suit removed into the Federal Court from a State Court, although the plaintiff was the assignee of an assignor who could not have sued the defendant in the Federal Court.

In Delaware County *v.* Diebold Safe Co., *supra*, the Supreme Court again held the same rule, Mr. Justice Gray, who delivered the opinion of the Court, saying (133 U. S., p. 485):

"Before proceeding to consider the merits of this case it is necessary to dispose of the objections taken to the jurisdiction assumed by the Circuit Court of the United States. It was contended that that Court had not cognizance of the suit, because the plaintiff's assignors could not have prosecuted it, inasmuch as one of them was a citizen of the same State as the defendant. But that restriction was applicable only to suits commenced in the Federal Court, and did not extend to suits removed into it from a State Court."

(*B.*) The above cases of Mansfield R. R. *vs.* Swan, Metcalf *vs.* Watertown and Parker *vs.* Ormsby, all

show that a defendant by removal, does not waive his right to object to the jurisdiction of the Court.

In Morris *v.* Gilmer, 129 U. S., 315 (1889), it is said:

> "It is true that by the words of the statute this duty arose only when it appeared to the satisfaction of the Court that the statute was not one within its jurisdiction, but if the record discloses a controversy of which the Court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit, and its failure or refusal to do what under the law applicable unto the facts it properly ought to do, is an error which this Court upon its motion will correct when the case is brought here for review. This rule is inflexible and without exception, as was said upon full consideration in Mansfield, &c., Railroad Co. *v.* Swan, 111 U. S., 382, citing other cases. * * * It is contended that the defendant precluded himself from raising the question of jurisdiction by inviting the action of the Court upon his plea of former adjudication, and by waiting until the Court had ruled that plea to be insufficient in law.
>
> * * * * * *
>
> We have already seen that this Court must upon its own motion guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the Circuit Court has or has not jurisdiction is a question which this Court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits."

THE LAW ASSOCIATION —OF— PHILADELPHIA.

Fifth Point.

Each of the questions certified to this Court should be answered, that the United States Circuit Court for the Eastern District of New York, had no jurisdiction to hear and determine the cause of action, and the United States Circuit Court of Appeals for the Second Circuit should be instructed to remand the cause to the Circuit Court with directions to remand it to the State Court from which it was removed.

TREADWELL CLEVELAND,
Of Counsel for the
Railroad Company.

APPENDIX A.

Arbitration Agreement.

MEMORANDUM OF AGREEMENT, between the Mexican National Construction Company (hereinafter called the Construction Company) and the Mexican National Railroad Company (hereinafter called the Railroad Company).

WHEREAS, The Construction Company has demanded of the Railroad Company the payment in cash of moneys claimed by the Construction Company to be due from the Railroad Company as part of the $217,000 set apart by the Matheson-Palmer Agreement as therein mentioned; and

WHEREAS, The Railroad Company has not admitted such claim of the Construction Company, but, on the contrary, claims that, by reasons of the so-called Matheson-Palmer agreement, or otherwise, it has set-offs against the claim of the Construction Company by reason of acts done, and things that have happened, since October 15, 1886, but not prior to that date, and that on a full accounting between it and the Construction Company the balance of account will be largely in favor of the Railroad Company, which claim of the Railroad Company the Construction Company denies; and

WHEREAS, It is desirable that the claim of the Construction Company shall be speedily determined and settled;

NOW, THEREFORE, In consideration of the premises and of one dollar by each of the parties hereto to the other in hand paid, and of the mutual covenants and stipulations hereinafter contained, it is agreed as follows:

I.—The parties hereto agree that the said claim of the Construction Company shall be and the same hereby is referred for final sttlement to arbitrators, whose award, or the award of a majority of them

thereon, made as hereinafter provided, shall be effectual and binding upon both parties.

II.—There shall be three arbitrators, one of whom shall be Treadwell Cleveland, Esq., now and heretofore counsel for the Railroad Company, on the part of the Railroad Company, and the second of whom shall be Edward M. Shepard, Esq., now and heretofore counsel for the Construction Company, on the part of the Construction Company, and the third of whom shall be a person to be selected by the said two arbitrators first named; and the award of any two of the three arbitrators shall be binding and conclusive upon the parties hereto.

III.—The arbitrators shall finally award and decide the amount of money, if any, which by reason of such claim of the Construction Company is owing by the Railroad Company to the Construction Company, and the amount of the award, if any made, in favor of the Construction Company, shall bear interest at the rate of six per cent. per annum from the 31st of July, 1887, and shall forthwith, upon the making of such award and within ten days thereafter, be paid in cash by the Railroad Company to the Construction Company. The Railroad Company may present to the arbitrators the question whether all or any of the claims of the Railroad Company against the Construction Company by reason of the so-called Matheson-Palmer agreement, or otherwise, by reason of acts done and things that have happened since October 15, 1886, but not prior to that date, are just set-offs against the amounts, if any, which shall be found due to the Construction Company upon its claim as aforesaid. And all such claims that shall be adjudged by any two of the said arbitrators to be just set-offs as aforesaid shall, to the amount so determined by the arbitrators, diminish any claim or award in favor of the Construction Company against the Railroad Company. But the arbitrators shall not have power to make any affirmative award

against the Construction Company and in favor of the Railroad Company in excess of the award in favor of the Construction Company against the Railroad Company.

IV.—That in case either one of the two arbitrators hereinbefore named for the parties, that is to say, Messrs. Cleveland and Shepard, shall die or become incapacitated, or refuse to serve as such arbitrators, then an arbitrator shall be appointed in his place by the party appointing him, and in case such arbitrator shall not be so appointed within seven days from the time when written notice of the vacancy shall have been given to such party, then he shall be appointed upon an application to be made by either party to said agreement by the Supreme Court of New York. In case the third arbitrator to be appointed as aforesaid by the other two arbitrators shall die or become incapacitated or refuse to serve as such arbitrator, then another arbitrator shall be appointed in his place by the two other arbitrators, and in case such arbitrator shall not be so appointed within seven days from the time when written notice of the vacancy shall have been given, then he shall be appointed by said Supreme Court upon an application to be made by either party.

It is expressly understood that Messrs. Cleveland and Shepard do not give up their absolute positions as counsel for the respective parties hereto, although they are to sincerely strive to agree upon the truth of the matter. It is also understood that both Mr. Cleveland and Mr. Shepard is at liberty to confer with his respective client outside of the proceedings upon the arbitration.

V.—The arbitrators shall sit in New York. They shall there hear and receive such statements, accounts and testimony as either party hereto may produce either in behalf of or against the claim of the Construction Company as aforesaid, or in behalf of or against any of the claims of set-offs made by the Railroad Company

against the Construction Company. The hearing before the arbitrators shall begin not later than the 25th day of April, 1890, and shall be concluded within not more than three months thereafter. The arbitration shall proceed upon a notice of five days; but after the hearing shall commence the arbitrators may hold and adjourn hearings according to their discretion, subject to the foregoing provisions regarding the terms of the arbitration. The report of the arbitrators shall be made at the City of New York; and the expense of the arbitration shall be borne equally by the two parties hereto. In case either of the arbitrators shall, during the arbitration, refuse or omit to proceed therewith, then it shall be the duty of the other arbitrators to proceed with the arbitration.

VI.—It is further agreed that the Railroad Company shall not waive any claim against the Construction Company by reason of such arbitration or any award thereunder, except to the extent to which such claim shall have been allowed by the arbitrators to diminish the amount awarded to the Construction Company. Nor shall any claim made by the Railroad Company be availed of after the award of the arbitrators to resist or delay the satisfaction to the Construction Company of the award.

VII.—It is further agreed that simultaneously with the execution of these presents the Railroad Company shall deposit with the State Trust Company of the City of New York $100,000 in "A" and $100,000 in "B" second mortgage bonds of the Mexican National Railroad Company (of which $25,000 of each class are represented by receipt of Eugene Kelly, being under pledge); such bonds to be security to the Construction Company for the payment of the award, if any, in its favor, and for that purpose to be subject to the order or award of a majority of the said arbitrators. The arbitrators or a majority of them shall in their award value said bonds at their market value at the time of making

such award; and in case there shall be an award against the Railroad Company then the award shall provide that in case its amount be not paid within ten days after the making of the award that there be delivered, and thereupon there shall be delivered to the Construction Company a sufficient number of the said bonds so deposited to satisfy at their market value, ascertained in the arbitration as aforesaid, the amount of such award. If the amount of the award shall exceed the market value of all the bonds (after allowing the lien, if any, upon such of the said bonds as are now pledged as aforesaid to Eugene Kelly) then the award shall provide for the payment of the excess in cash. If the amount of the award shall not be as much as the market value of the bonds then the bonds not necessary to meet the award shall be returned to the Railroad Company.

IN WITNESS WHEREOF, the parties hereto have caused their respective corporate seals to be hereto affixed, and these presents to be witnessed for the Railroad Company by its Vice-President, and for the Construction Company by its Vice-President this fourteenth day of April, eighteen hundred and ninety.

THE MEXICAN NAT. R. R. CO.,
By
J. A. HORSEY,
[SEAL.] Vice-President.
Attest:
G. W. BARNARD,
Ass't Sec'y.

THE MEXICAN NATIONAL CONSTRUCTION CO.,
By
WALTER HINCHMAN,
[SEAL.] Vice-Prest.
Attest:
W. W. NEVIN,
Sec'y.

APPENDIX B.

Stipulation on the trial. Original Record, ff. 554-557.

"It is stipulated between the parties that either party may use the entries made in regular course of business in the books of either company, meaning the books of the Railway Company or the books of the Construction Company or the books of the Railroad Company, and also any memorandum prepared in usual course for such entries, and the vouchers or papers or payments prepared in usual course for any such entries, and vouchers or papers for payments or other purposes used in regular course by either of said companies, or for or in preparation of entries to be made in the books of the three companies or either of them. Either party shall be at liberty to offer testimony correcting any of the entries or the contents of any memorandum, voucher or paper which may be introduced under this stipulation. It is understood that upon the production of any voucher, memorandum or paper there are to be produced, if possible, all papers or memoranda originally attached to such voucher, memorandum or paper.

Subject to correction upon reference to original sources of information, either party may read from the Book of Arbitration Proceedings any statement of figures or facts testified to by any witness.

The date of the Matheson-Palmer agreement shall be taken to be the 1st of October, 1886, instead of 15th October, 1886, except so far, if at all, as the date may affect the claim of the Construction Company of the $40,000 of notes and $80,000 of stock. As to those notes and the stock and any claims of either party under them, no objection shall be made as to the form of the pleadings. And so far as concerns the general claim of the parties which shall be herein made, whether as to obligations as of the date of

the Matheson-Palmer agreement or otherwise, the pleadings as to such notes and such stock, or by reason of them, are to be amended to conform to the facts proved.

The testimony of any witness upon the arbitration, or any statement produced by him of such arbitration, can be referred to by either party as if such statement or testimony were given on the trial hereof, each party to indicate before the final submission of the case to the Court what portions of arbitration testimony or statement he desires to have incorporated in this record."

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15-201

FILED
FEB 2 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

THE MEXICAN NATIONAL RAILROAD COMPANY,
Plaintiff in Error,

versus

JOSEPH A. DAVIDSON,
Defendant in Error,

No. 880.

JOSEPH A. DAVIDSON,
Plaintiff in Error,

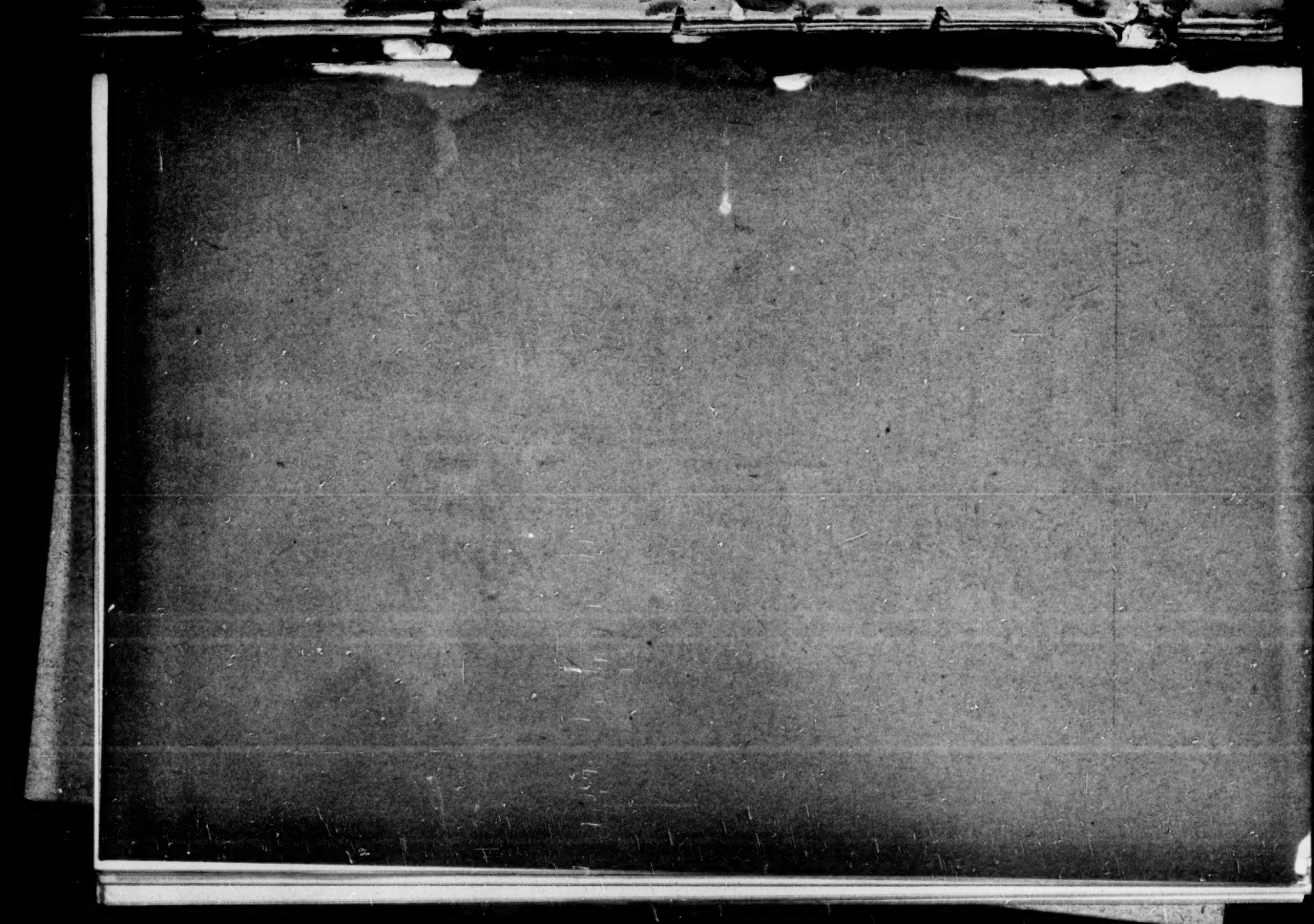
versus

THE MEXICAN NATIONAL RAILROAD COMPANY,
Defendant in Error.

No. 876.

BRIEF FOR DAVIDSON.

EDWARD M. SHEPARD,
Of Counsel for JOSEPH A. DAVIDSON.



Supreme Court of the United States.

OCTOBER TERM, 1894.

THE MEXICAN NATIONAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DAVIDSON, DEFENDANT IN ERROR.

No. 880.

AND

JOSEPH A. DAVIDSON, PLAINTIFF IN ERROR,

vs.

THE MEXICAN NATIONAL RAILROAD COMPANY, DEFENDANT IN ERROR.

No. 876.

Brief for Joseph A. Davidson.

These causes are in this Court upon certificate from the United States Circuit Court of Appeals for the Second Circuit. Both the causes were in that court upon writs of error, one taken out by Davidson, the original plaintiff, and one taken out by the Railroad Company, the original defendant, from a judgment rendered in the Circuit Court of the United States for the Eastern District of New York, in favor of the plaintiff and against the defendant, on 24th November, 1893, for $151,842.31. The certificates are identical in form, except that in the second case the positions of the parties respectively as plaintiff in error and defendant in error are reversed.

Statement of Facts.

The plaintiff Davidson began the suit on 11th September, 1891, in the Supreme Court of the State of New York against the defendant, the Mexican National Railroad Company. Davidson was at the time and is a citizen of the State of New York and a resident of the Eastern District thereof. The Railroad Company was a corporation created under the laws of the State of Colorado. The plaintiff Davidson served his complaint in the State court on 8th October, 1891; and on 28th October, 1891, the defendant, the Railroad Company, removed the cause into the Circuit Court for the Eastern District of New York. The plaintiff claimed under an assignment made to him 11th September, 1891, by the Mexican National Construction Company, a corporation created by the laws of Colorado. He sought to recover upon two causes of action: *First*, the amount of a debt owing the Construction Company by the Mexican National Rail*way* Company, the original owner of the railroad property, which the defendant Rail*road* Company, in consideration of the transfer to it of certain railroad property, agreed to pay; and, *Secondly*, damages sustained by the Construction Company through the breach by the defendant Railroad Company of an agreement between it and the Construction Company to adjust the first claim by arbitration.

The defendant Railroad Company answered in the Circuit Court, but made no objection to the jurisdiction of the Court, which it had thus itself invoked. No question of jurisdiction was raised upon the trial, and no such question was referred to in the findings or opinion of the Circuit Court. Indeed, the defendant itself asked the Circuit Court for an affirmative judgment for a money recovery against the plaintiff Davidson (*original paging*, 4). It was not until nearly six months after the judgment in the Circuit Court, and

not until the defendant Railroad Company filed its assignment of errors on 21st May, 1894, that any objection to jurisdiction was made (*original paging*, 4).

The writs of error taken by both parties coming on for argument before the Court below on 10th December, 1894, the question of jurisdiction was first argued, and the Court suspended further argument in order that the opinion of this Court upon that question might be taken. The questions certified to this Court for decision are :

First, Whether the Circuit Court had jurisdiction to hear and determine the first cause of action ; and

Secondly, Whether the Circuit Court had jurisdiction to hear and determine the second cause of action.

The copies of the complaint and of the defendant's answer in the Circuit Court are annexed to the certificate in order that the nature of the plaintiff's causes of action may more clearly and certainly appear.

Argument.

I.

THE DEFENDANT RAILROAD COMPANY, HAVING ITSELF REMOVED THE SUIT INTO THE CIRCUIT COURT, JURISDICTION IS NOT DEFEATED BECAUSE OF THE ORIGINAL DISABILITY OF DAVIDSON'S ASSIGNOR TO COMPEL THE DEFENDANT RAILROAD COMPANY TO APPEAR IN THE CIRCUIT COURT.

First.—I do not for a moment doubt the necessity which the Court below was under to deal with the question of jurisdiction at any stage, whether raised by either party or not. If there were a total and original lack of jurisdiction of the subject matter of the suit, no waiver or consent could give jurisdiction. But it is submitted that the restriction in the latter part of the first section of the Act of 1887 is *not* something carved out of the original grant so that to that extent the original grant is as if it had never been made.

Secondly.—The removal from the State Court to the Federal Court took place under the Act of 3d March, 1887 (chapter 373), as amended by the Act of 13th August, 1888 (chapter 866). The second section of that Act provides as follows:

"Any other suit of a civil nature, at law or in equity, "*of which the circuit courts of the United States are* "*given jurisdiction by the preceding section*, and which "are now pending, or which may hereafter be brought, "in any State court, may be removed into the circuit "court of the United States for the proper district by "the defendant or defendants therein, being non-"residents of that State."

The Railroad Company upon its writ of error raised for the first time the question whether the suit in the State Court were one "of which the circuit courts of "the United States are *given* jurisdiction by the pre-

" ceding section," that is to say, by the first section of the Act of 1887 as amended as aforesaid. The grant of jurisdiction in that section is in these words :

" That the circuit courts of the United States shall " have original cognizance, concurrent with the courts " of the several States, of all suits of a civil nature, at " common law or in equity, where the matter in dispute " exceeds, exclusive of interest and costs, the sum or " value of two thousand dollars, and arising under the " Constitution or laws of the United States, * * * or in " which there shall be a controversy between citizens " of different States, in which the matter in dispute " exceeds, exclusive of interest and costs, the sum or " value aforesaid, * * and shall have * * * " concurrent jurisdiction with the district courts of " the crimes and offenses cognizable by them."

In the statute as printed in the Statutes at Large the paragraph and sentence here end ; and there follow these words, all forming part of a separate single sentence and punctuated as follows :

" But no person shall be arrested in one district for " trial in another in any civil action before a circuit or " district court ; and no civil suit shall be brought be- " fore either of said courts against any person by any " original process or proceeding in any other district " than that whereof he is an inhabitant, but where the " jurisdiction is founded only on the fact that the action " is between citizens of different States, suit shall be " brought only in the district of the residence of either " the plaintiff or the defendant ; *nor* shall any circuit " or district court have cognizance of any suit, except " upon foreign bills of exchange, to recover the con- " tents of any promissory note or other chose in action " in favor of any assignee, or of any subsequent holder " if such instrument be payable to bearer and be not " made by any corporation, unless such suit might " have been prosecuted in such court to recover the " said contents if no assignment or transfer had been " made ;"

The provision for removal in the second section of the Act of 1887 plainly refers to the affirmative grant

of jurisdiction in the first part of the first section. The language of the second section is, "any other suit " * * * of which the circuit courts of the United " States are *given* jurisdiction by the preceding " section." The limitation or restriction with reference to an assigned cause of action is grouped with the restriction against suing a person in any other district than that whereof he is an inhabitant, and the restriction that, where the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

St. Louis, &c., Railway v. *McBride*, 141 U. S., 127, at pages 128 and 131, per BREWER, *J.* :

" The action was one to recover money, the sum " claimed being in excess of two thousand dollars, and " was between citizens of different States, and was " brought in the district and State of the residence of " the plaintiffs. It was a case, therefore, within the " general jurisdiction of the circuit courts of the " United States, under section one of chapter 866, 25 " Stat. 433 ; and if the jurisdiction was founded only " on the fact that the action was between citizens of " different States it was brought in the circuit court " of a proper district. * * * The *first part of sec-* " *ion one* of the Act of 1887, as amended in 1888, " *gives, generally*, to the Circuit Courts of the United " States *jurisdiction of controversies between citizens of* " *different States* where the matter in dispute exceeds " the sum of two thousand dollars exclusive of interest " and costs. Such a controversy was presented in this " complaint. *It was, therefore, a controversy of which* " *the Circuit Courts of the United States have juris-* " *diction.*"

Amsinck v. *Balderston*, 41 Fed. Rep., 641: This decision was rendered on 15th June, 1889, by Judge GRAY of this Court, upon a motion to remand. In his opinion, speaking of the Act of 1887, he said:

" The second section authorizing the removal into " a Circuit Court of the United States of any suit " brought in a state court 'of which the circuit courts " 'of the United States are given original jurisdiction " 'by the preceding section,' evidently refers to the " *general grant of jurisdiction at the* BEGINNING *of that*

"*section* and not to the special regulations as to the "district in which an action may be commenced."

First National Bank v. *Merchants' Bank*, 37 Fed. Rep., 657: This decision was rendered on 16th June, 1888, in the Georgia Circuit. The Court dealt with the restrictive provisions of section 1 of the Act of 1887, against suit by original process against any person in a district of which he is not an inhabitant. The Court said (page 659):

"I do not think that it can be said that jurisdiction "is *given* by the language quoted from the latter part "of Section 1. * * * Jurisdiction is conferred on "the circuit courts by the *first part of section 1*, and "that jurisdiction, when founded on citizenship, "is between citizens of different States, provided the "jurisdictional amount is involved; and it is *to that* "*portion of the section, instead of the latter part*, fixing "the place where suits may be brought by original "'process or proceeding,' section 2 refers. 'Removal of "'Causes' by Judge SPEER, of the Southern District "of "Georgia, § 21 *et seq.*, and analysis C; Fales *v.* "Railway Co., 32 Fed. Rep., 673; Short *v.* Railway "Co., 34 Fed. Rep., 225 (approving the Fales case); "Vinal *v.* Improvement Co., 34 Fed. Rep., 228."

The Court referred to decisions, in which it said that "without any discussion of the subject and with-"out reason given therefor," it had been held that the language quoted from section 2 applied to the latter part of section 1. The Court stated its own dissent from those views; and in a note the reporter added that Judge BREWER of this Court, who had participated in one of those decisions, had later announced a different view (*Railroad Co.* v. *Lumber Co.*, 37 Fed. Rep., 3). But upon this question there is explicit authority in this Court.

Bushnell v. *Kennedy*, 9 Wall., 387. The Court here dealt with a case brought by an assignee, in which the defendant, after himself procuring a removal of the cause from the State court to the Federal court, objected to the jurisdiction of the latter. The case arose under the judiciary Act of 1789. Between the eleventh section of that act and the first section of the

Act of 1887, there is, in respect of the grouping of the provisions, no difference, as is apparent from the following comparison of the two acts :

Section 11, Act of 1789.	*Section 1, Act of 1887, as amended by Act of 1888.*
"That the circuit courts	"That the circuit
"shall have original cog-	"courts *of the United*
"nizance, concurrent with	"*States* shall have origi-
"the courts of the seve-	"nal cognizance, con-
"ral States, of all suits of	"current with the courts
"a civil nature at com-	"of the several States, of
"mon law or in equity,	"all suits of a civil
"where the matter in dis-	"nature, at common
"pute exceeds, exclusive	"law or in equity, where
"of costs, the sum or	"the matter in dispute
"value of *five hundred*	"exceeds, exclusive of
"dollars, and	"*interest and* costs, the
	"sum or value of *two*
	"*thousand* dollars, and
	"*arising under the Con-*
	"*stitution or laws of the*
	"*United States, or treaties*
	"*made, or which shall be*
	"*made, under their au-*
	"*thority, or in which*
"the United	"*controversy* the United
"States are plaintiffs, or	"States are plaintiffs or
"petitioners ; or *an alien*	"petitioners, or *in which*
"*is a party, or the suit is*	"*there shall be a con-*
"*between a citizen of the*	"*troversy between citi-*
"*state where the suit is*	"*zens of different States,*
"*brought, and a citizen*	"*in which the matter in*
"*of another state.*	"*dispute exceeds, exclu-*
	"*sive of interest and*
	"*costs, the sum or value*
	"*aforesaid*, or *a contro-*
	"*versy between citizens of*
	"*the same State claiming*
"And	"*lands* * * * , and
"shall have exclusive cog-	"shall have exclusive
"nizance of all crimes *	"cognizance of all
"* * . **BUT** no person	"crimes * * * . **BUT**
"shall be arrested in one	"no person shall be
"district for trial in	"arrested in one district
"another, in any civil ac-	"for trial in another in

" tion before a circuit or	" any civil action before a
" district court: and no	" circuit or district court;
" civil suit shall be	" and no civil suit
" brought before either of	" shall be brought before
" said courts against *an*	" either of said courts
" *inhabitant of the United*	" against *any person* by
" *States*, by any original	" any original process *or*
" process in any other	" *proceeding* in any other
" district than that where-	" district than that where-
" of he is an inhabitant,	" of he is an inhabitant,
" *or in which he shall be*	" *but where the jurisdic-*
" *found at the time of*	" *tion is founded only*
" *serving the writ*,	" *on the fact that the action*
	" *is between citizens of dif-*
	" *ferent States, suit shall*
	" *be brought only in the dis-*
	" *trict of the residence of*
	" *either the plaintiff or the*
" nor	" *defendant*; nor shall
" shall any *district* or *cir-*	" any *circuit* or *district*
" *cuit* court have cogni-	" court have cognizance of
" zance of any suit to	" any suit, *except upon for-*
" recover the contents of	" *eign bills of exchange*, to
" any promissory note or	" recover the contents of
" other chose in action in	" any promissory note or
" favor of *an* assignee,	" other chose in action in
" unless *a* suit might	" favor of *any* assignee,
" have been prosecuted	" *or of any subsequent*
" in such Court to recover	" *holder if such instru-*
" the said contents if no	" *ment be payable to*
" assignment had been	" *bearer and be not made*
" made, *except in cases*	" *by any corporation*, un-
" *of foreign bills of ex-*	" less *such* suit might
" *change.*	" have been prosecuted in
	" such court to recover
	" the said contents if no
	" assignment *or transfer*
" And	" had been made; and
" the circuit courts shall	" the circuit courts shall
" also have appellate juris-	" also have appellate juris-
" diction from the district	" diction from the dis-
" courts under the regula-	" trict courts under the
" lations and restrictions	" regulations and restric-
" *hereinafter provided.*"	" tions *prescribed by law.*"

This comparison makes it clear that the restriction upon a suit by an assignee occupies precisely the same relation to the general grant of jurisdiction in the Act

of 1887 that the like restriction did to the general grant of jurisdiction in the Act of 1789.

The case of *Bushnell* v. *Kennedy*, becomes, therefore, a case precisely in point. The decision was rendered at the December Term, 1869, the CHIEF JUSTICE being at the pains to state (p. 294) that all of the judges concurred in the decision. As has already been stated, the suit was brought by an assignee of a chose in action in the State court and was removed from the State court to the Circuit Court by the defendant. The Circuit Court refused to entertain jurisdiction and remanded the cause to the State court. This Court reversed the order, declaring that the office of the "restriction" in the eleventh section of the act of 1789 "was to pre-"vent frauds upon the jurisdiction, *and vexation of de-"fendants*, by assignments made for the purpose of "having suits brought in the name of assignees, but in "reality for the benefit of assignors"; and that in the twelfth section the restriction "would have no "office, for the removal of suits could not operate as "a fraud on jurisdiction, and *was a privilege of de-"fendants*, not a hardship upon them." The Court added (p. 393):

> "The defendant is not in court against his consent, "but by his own act, and the suit is to proceed as if "brought by original process, and the defendant had "waived all exception to jurisdiction, and pleaded to "the merits. *Under the 11th section the exception "to jurisdiction is the privilege of the defendant*, and "may be waived; for the suit is still between citi-"zens of different States, and the jurisdiction still ap-"pears in the record. The first act of the defendant, "indeed, under the 12th section, is something more "than consent, something more than a waiver of ob-"jection to jurisdiction, it is a prayer for the privi-"lege of resorting to Federal jurisdiction, and he can-"not be permitted afterwards to question it."

It is submitted that this authority is decisive. It has never been overruled or doubted; and no distinction in the reason of the thing can be drawn between it and the case now at bar. The parties hereto during

their years of litigation below were entitled to rely upon this interpretation of the law.

Thirdly.—It is, upon the authorities, not open to dispute that, prior to the Act of 1887, the defendant, having itself removed the cause, could not object to jurisdiction, if the cause were within the original grant of jurisdiction at the beginning of the 11th section of the Act of 1789, or of the 1st section of the Act of 1875. The defendant can now defeat jurisdiction, if at all, only because of the use in the 2nd section of the Act of 1887 of the expression "of "which the circuit courts of the United States are "given jurisdiction by the preceding section" in place of the repetition at length, as in the Act of 1875, in its 2nd section of the specification of causes within the original grant of jurisdiction at the beginning of its 1st section, or in place of the repetition at length, as in the Act of 1789, in its 12th section, of the like specification of causes at the beginning of its 11th section.

The expression substituted in the 2nd section of the Act of 1887 was not intended, it is submitted, to reverse the rule nearly a hundred years old, but merely as a convenient abbreviation of the list of causes mentioned at the beginning of the 1st section, and of which jurisdiction was there *given*.

Fourthly.—In Section 1 of the Act of 1875 (18 Stats. at Large, p. 470, Chap. 137), there is contained a corresponding prohibition:

"* * nor shall any circuit or district court "*have cognizance of any* suit founded on contract in "favor of an assignee, unless a suit might have been "prosecuted in such court", etc.

But, peremptory and general as was this language when considered in itself, this Court, having regard to its position in the statute, refused to interpret it as a general negative of jurisdiction, or to extend its effect to the next section, which related to removals. The prohibition against actions by assignes was therefore held not to apply to suits begun in the State Court and

removed to the Federal Court,—and this, although under the Act of 1875, either party could remove.

Claflin *v.* Commonwealth Co., 110 U. S., 81.
Delaware Co. *v.* Diebold Co., 133 U. S., 473.

Fifthly.—If the defendant shall refer to the rule that jurisdiction of the circuit court over the controversy between the defendant and the plaintiff's assignor needed to be shown by the complaint, I answer that that rule applies only to suits originally brought in the circuit court. Here the suit was brought by the assignee in the State court, and it was there pending when the defendant removed it.

Sixthly.—It was said below upon the argument that this Court had repeatedly held that the Act of 1887 was intended to restrict the jurisdiction of the circuit courts. But it has never been said by this Court, so far as I have examined the cases, that in the law of 1887 there was an intention to carve the restriction in the case of an assignee out of the original grant of jurisdiction, while in the Act of 1789 there was no such intention. None of the cases in which this Court has said of the Act of 1887 that it was intended to restrict rather than extend jurisdiction, has turned upon an interpretation of the proviso against suits by assignees. The cases are these :

Smith v. *Lyon*, 133 U. S., 315 : The Court here decided the question whether the requirement that suits should be brought only in the district of the residence of either the plaintiff or the defendant were satisfied by bringing it in the district of the residence of one plaintiff when another plaintiff resided in a different district, and held that the parties plaintiff were to be classed together.

Re Pennsylvania Co., 137 U. S., 451 : The question was whether the Act of 1887, as re-enacted on 13th August, 1888, which denied an appeal from an order of a circuit court remanding a cause to the State court, still permitted the same question to be presented

by mandamus in this Court to the circuit court to take cognizance of the cause.

Fisk v. *Henarie*, 142 U. S., 459 : This dealt with the question when the petition for removal must be filed.

Shaw v. *Quincy Co.*, 145 U. S., 444 : This determined that a corporation incorporated in one State only could not be compelled to answer in a circuit court in another State where it had a usual place of business.

Martin v. *Baltimore Co.*, 151 U. S., 673 : This held that the licensing of a corporation within one State and its subjection to suit in the courts of that State did not deprive it of the power of removal of a cause brought against it in a court of that State.

Tennessee v. *Union Bank*, 152 U. S., 454 : This determined that, where general jurisdiction depends upon the character of the suit as one arising under the Constitution or laws of the United States, such nature of the suit must appear by the plaintiff's own statement.

Hanrick v. *Hanrick*, 153 U. S., 192 : This determined that one defendant could not on the ground of prejudice and local influence between himself and other defendants remove the cause into the circuit court.

II.

THE PLAINTIFF'S FIRST CAUSE OF ACTION WAS NOT WITHIN THE PROVISO AGAINST ASSIGNEES IN THE ACT OF 1887.

First.—The plaintiff's first cause of action is set forth in the complaint which forms part of the certificate (*original paging*, 6-14). It may be briefly stated as follows : The Mexican National Railway Company prior to 15th October, 1886, was the owner of the Mexican National Railroad. That company having become embarrassed, an agreement to reorganize its affairs was made between the company itself and certain of its bondholders and stockholders, and among them the Mexi-

can National Construction Company, the plaintiff's assignor. By the terms of that agreement, called the Matheson-Palmer agreement (*original paging*, 18-40) it was provided that an existing first mortgage upon the railroad should be foreclosed and the property bought in by a committee; that a new railway company (*original paging*, 19, 20) should be organized to take over the property; that the new company, becoming the owner, should issue a new first mortgage, which should be a first lien upon the property, and issue a series of first mortgage bonds. Of these bonds the agreement provided that $9,500,000 in par value should be sold, and that from the proceeds there should be reserved "a sum not exceeding $217,-"000, to be applied to liquidate the indebtedness of "the existing railway company" (*original paging*, 25). The Construction Company was at the time of this agreement one of the floating creditors of the old railway company. The plan of reorganization was carried out. The defendant company was formed as the new company contemplated by the agreement. It became the purchaser of the property. It issued the new first mortgage bonds, and it sold $9,500,000 of them and received the proceeds thereof, and as part of such proceeds the sum of $217,000 with which to pay the indebtedness of the old railway company. It in fact paid all such indebtedness except the indebtedness due to the Construction Company, and after such payment had been fully made it had in hand sufficient moneys to pay the entire debt due the Construction Company. It refused to do so. It may be added that the foreclosure contemplated was a friendly one, requiring the co-operation of the Construction Company, and even a conveyance from that company. The defendant company received its title, not only under the foreclosure but under direct conveyance of the Construction Company (*original paging*, 10, 11).

It will be perceived that the defendant's liability was not a liability *contained* in the Matheson-Palmer agreement. It was a liability which arose by implication out of its acceptance under the terms of that agree-

ment of the conveyance of the railroad. The defendant Railroad company was not a party to the Matheson-Palmer agreement. It was not in existence when that agreement was made.

It is, therefore, submitted that the cause of action is not within the exception contained in the act of 1887. It is submitted that that exception was intended to include promissory notes and like instruments having "contents" according to the original signification of the expression.

Under the judiciary act of 1789 this Court finally, although not without judicial protest against an ascription to the lawmakers of a most inapt use of language, came to construe the expression "contents of a chose "in action" to mean any right of action to recover money on a contract.

Sheldon v. *Sill*, 8 How., 441.
Corbin v. *Black Hawk*, 105 U. S., 659.
Shoecraft v. *Bloxham*, 124 U. S., 730.

When Congress passed the Act of 1875, it adopted the judicial interpretation, but enacted it in apt words. The prohibition was expressly prescribed to be against "any suit founded on contract in favor of an assignee."

Secondly.—The first section of the Act of 1875, stated the exception as follows (page 470):

"* * * nor shall any circuit or district court "have cognizance of *any suit founded on contract* in "favor of an assignee, unless a suit might have been "prosecuted in such court to recover thereon if no as-"signment had been made, except in cases of promis-"sory notes negotiable by the law merchant and bills "of exchange."

The corresponding words of the Act of 1887, as amended by the Act of 1888, are as follows:

"* * * nor shall any circuit or district court "have cognizance of any suit, except upon foreign "bills of exchange, to recover the contents of any "promissory note or other chose in action in favor of "any assignee, or of any subsequent holder if such in-"strument be payable to bearer and be not made by

"any corporation, unless such suit might have been
"prosecuted in such court to recover the said contents
"if no assignment or transfer had been made."

The Court will perceive that the Act of 1887 differs from the Act of 1875 in this, that, whereas the restriction of 1875 was against "*any suit founded on con-*
"*tract* * * * except in cases of promissory notes
"negotiable by the law merchant and bills of exchange," the restriction of the Act of 1887 is against "any suit
"* * * to recover the contents of *any promissory*
"*note or other chose on action* in favor of any assignee,
"or of any subsequent holder if such *instrument* be
"payable to bearer and be not made by any corpora-
"tion."

When Congress in place of the sweeping expression "founded on *contract*" which it had used in the Act of 1875,—an expression which reached the extreme limit of the judicial interpretation of the expression "chose in action" used in the earlier act of 1789 (*Sheldon v. Sill*, 8 How., 441, *supra*),—substituted the old expression *contents of a chose in action*, and, in the light of *Bushnell* v. *Kennedy*, added the limiting language of 1887, it is submitted to be plain that the intention was to diminish the sweeping restriction of 1875. If the intention of Congress in the Act of 1887 were what the defendant contends, then the Act of 1875 should simply have been modified so as to read:
"Any suit founded on contract in favor of an assignee
"or subsequent holder."

Thirdly.—The proviso, since it creates a special restriction to the general grant of jurisdiction, must be construed strictly, limiting it to the necessary meaning of the words employed and interpreting it rigorously according to the rule *ejusdem generis*.

United States v. *Dickson*, 15 Peters, 141, 165, per STORY, *J.*:

"We are led to the general rule of law, which has
"always prevailed, and become consecrated almost
"as a maxim in the interpretation of statutes, that

"where the enacting clause is general in its language "and objects, and a proviso is afterwards introduced, "that proviso is construed strictly, and takes no case "out of the enacting clause which does not fall fairly "within its terms. In short, a proviso carves special "exceptions only out of the enacting clause; and "those who set up any such exception, must establish "it as being within the words as well as within the "reasons thereof."

Minis v. *United States*, 15 Peters, 433, 445, per STORY, *J.*:

"The office of a proviso, generally, is, either to ex- "cept something from the enacting clause, or to "qualify or restrain its generality, or to exclude some "possible ground of misinterpretation of it, as extend- "ing to cases not intended by the legislature to be "brought within its purview. A general rule, appli- "cable to all future cases, would most naturally be "expected to find its proper place in some distinct and "independent enactment."

Potter's Dwarris on Statutes, 118, n. 11.
Epps v. *Epps*, 17 Illinois App. Ct., 196.
Clark's Appeal, 58 Conn., 207.
Ryan v. *Carter*, 93 U. S., 78, 83.

The rule *ejusdem generis* is that general words following specific words of a like nature "take their "meaning from the latter and are presumed to em- "brace only things or persons of the kind designated "by them" (23 Amer. & Eng. Enc. of Law, 441). This rule, applied to the clause in question, requires that the words "other chose in action" be limited to choses in action *ejusdem generis* with promissory notes and bills of exchange already specified.

The expression is: "the *contents* of any promissory "note or *other* chose in action * * * if *such in-* "*strument* be payable to bearer and be not made by "any corporation." It is submitted that the amended act referred only to promissory notes and like instruments,—instruments which, in the proper and conventional use of the term, have *contents*. That term originally meant the sum payable by the express terms of

an instrument for the payment of money only. Even under the act of 1789 this Court, after much consideration of the subject, came to distrust the view adopted in earlier decisions, that the term "chose in action" should have a broader interpretation.

Bushnell v. *Kennedy*, 9 Wallace, 387: The language of the Court was (p. 391):

"It may be observed that the denial of jurisdiction of "suits by assignees has never been taken in an abso- "lutely literal sense * * * And it has recently been "very strongly argued that the restriction applies only "to contracts, 'which may be properly said to have "'contents;' 'not mere naked rights of action founded "'on some wrongful act, some neglect of duty to which "'the law attaches damages, but rights of action "'founded on contracts which contain within them- "'selves some promise or duty to be performed.' And "this view of the restriction seems to be warranted "by the consideration of the mischief which it was in- "tended to prevent * * * This view has the sanc- "tion of Chief Justice MARSHALL, who, in the case of the "*Bank of the United States* v. *The Planters Bank of* "*Georgia*, 9 Wheaton, 904 (1824) used this language: "'It was apprehended that *bonds and notes* given in "'the usual course of business by citizens of the same "'State to each other, might be assigned to the citizens "'of another State, and thus render the maker liable to "'a suit in a Federal court.' * * * It may well be "admitted that it would not have been an unreasonable "construction of the restriction if it had been ap- "plied only to *notes, bonds, and other written contracts,* "*containing promises to pay money, upon which an* "*assignee could sue without using the name of the* "*assignor*. Of such contracts, certainly, it may with "more propriety be said that they have 'contents,' "than of *claims for damages arising* either from torts "or *from breaches of contract*."

Deshler v. *Dodge*, 16 How., 622: The Court said (p. 631):

"We are of opinion that this clause of the "statute has no application to the case of a suit by "the assignee of a chose in action to recover "possession of the thing in specie, or damages for its "wrongful caption or detention; and that it applies

" only to cases in which the suit is brought to recover " the *contents*, or to enforce the contract *contained in* " *the instrument* assigned.

Congress, in making a change from the Act of 1875 to the Act of 1887 must be presumed to have had in mind hese critical although authoritative expositions of the law. Congress knew that the expression " chose in action," as used in the Act of 1789, included only actions on contract. But the Act of 1875 already contained an amply sufficient restriction as to all actions on contract. Unless the Act of 1887 be construed so as to diminish the restriction of 1875, then the Act of 1887 was in this respect unnecessary and inoperative.

Fourthly.—This Court has interpreted the restrictions contained in the Act of 1887 according to the plaintiff's contention. The only authorities cited below by the defendant under the Act of 1887 were cases in the court below or in the circuit court rendered before the decision of this Court in *Ambler* v. *Eppinger*, *infra*. They were these:

Simons v. *Ypsilanti Co.*, 33 Fed. Rep., 193: This decision was rendered 3d January, 1888. It went so far as to assert that within the meaning of the Act of 1887 " a right of action upon an oral contract is as " much a chose in action as if the contract were in " writing."

Newgass v. *New Orleans*, 33 Fed. Rep., 196: This decision was rendered 2d January, 1888. It went quite as far as the preceding case, or even further, in extending the restriction against assignees in the Act of 1887.

Laird v. *Indemnity Co.*, 44 Fed. Rep., 712: This decision was rendered 29th December, 1890, the court following the authority of the two preceding cases. But in this case the learned judge did not cite, and could not then have had before him, a decision rendered by this Court one week before in

Ambler v. *Eppinger*, 137 U. S., 480: This decision was rendered 22d December, 1890, and dealt expressly with the effect of the limiting words now under con-

sideration. This Court cited with approval its former decisions in *Deshler* v. *Dodge* and *Bushnell* v. *Kennedy, supra*, where criticisms had been made of the very liberal interpretation of the expression "chose in ac- "tion" as used in the judiciary act of 1789; and the Court expressly held that the words in the Act of 1887, "if such instrument be payable to bearer, and "be not made by any corporation" limit and describe the expression "chose in action." The language of the Court was (p. 482):

> "This act, as appears on its face, does not embrace, "within its exceptions to the jurisdiction of those "courts, suits by an assignee upon claims like the de- "mand in controversy. The exceptions, aside from "suits on foreign bills of exchange, are limited to suits "on promissory notes and other choses in action, *where* "*the demand sought to be enforced is represented by an* "*instrument in writing, payable to bearer, and not* "*made by a corporation*, the words following the desig- "nation of choses in action indicating the manner in "which they are to be shown. They must be such *as* "*arise upon contracts of the original parties*, and not "founded, like the one in controversy, upon a trespass "to property."

The plaintiff's demand was not represented by an instrument in writing, although in part it depended upon such an instrument, nor was the Matheson-Palmer agreement an instrument payable to bearer. It was made by a corporation.

The plaintiff Davidson began his action in the State court in September, 1891. The removal was made upon the defendant's application on 28th October, 1891 (*original paging*, 2). At that time the law was thus authoritatively stated by this Court. A motion on the part of the plaintiff to remand would have been at once denied, and rightly. That the language used in the Act of 1887 was clumsy, is the fault neither of the courts nor of the parties to this litigation. The parties were both bound by the interpretation of the law made by this Court; and it is submitted that it would be an extreme injustice if a rule upon which both parties have acted should now be reversed.

It is proper to refer to later cases in this Court relating to the act of 1887.

Parker v. *Ormsby*, 141 U. S., 81: This was the case of a promissory note. The Court said (p. 84):

"It thus appears that the act of 1887, in respect to "suits to recover the contents of promissory notes or "other choses in action, differs from the act of 1789 "only in the particular that the act of 1887 excludes, "under certain circumstances, from the cognizance of "the circuit and district courts of the United States "suits in favor 'of any subsequent holder, if such in- "'strument be payable to bearer and be not made by "'any corporation.' It is not necessary now to consider "the meaning of the words just quoted; for the pres- "ent suit is by an assignee of a promissory note pay- "able, not to bearer, but to the order of the payee."

Holmes v. *Goldsmith*, 147 U. S., 150: This also was the case of a promissory note. The first inception of the note, as a contract, took place upon its delivery by the payee to the endorsee. The Court held that the payee and endorsee being citizens of different states, the circuit court had jurisdiction without reference to the citizenship of the maker of the note. This Court was not, therefore, called upon to consider the restriction contained in the act of 1887 upon jurisdiction in the cases of assigned causes of action.

Plant Co. v. *Jacksonville Co.*, 152 U. S., 71. This case, as is to be inferred from the report, arose under the Act of 1875 and not under the Act of 1887, and I am informed by the Clerk that the bill in the case was filed on 9th April, 1885. The Court was not, therefore, called upon to construe the provisions of the Act of 1887.

New Orleans v. *Benjamin*, 153 U. S., 411: This case did arise after the Act of 1887. It was brought against the City of New Orleans to recover on warrants issued by officers who represented that city. The Court said (page 435):

"The suit, must therefore, be regarded as a suit to "enforce the payment of the warrants and certifi- "cates, and as such, a suit to recover their *contents*, "and this is so on any other ground of equity jurisdic- "tion which has been suggested."

sideration. The certificate upon which the cause came from the Circuit Court of Appeals to this Court gave (p. 419) "sample copies of the warrants, certificates, pay-rolls "and assignments forming the basis of complainant's "demand." The warrants and certificates appear to be strictly for the payment of money, such as: "*Treas-* "*urer of the Board Metropolitan Police: Pay to the* "*order of James Reilly Fifty 00-100 dollars, By order* "*of the Board, E. Parker, Chief Clerk.*"

III.

THE PLAINTIFF'S SECOND CAUSE OF ACTION WAS NOT WITHIN THE PROVISO AGAINST ASSIGNEES IN THE ACT OF 1887.

The argument here is substantially the same as that with reference to the first cause of action, but there is some difference. The second cause of action arose upon a contract made directly between the plaintiff's assignor and the defendant. The plaintiff, however, did not seek to recover any money promised in the contract but damages for its violation. The contract was not for the payment of money but for a submission to arbitration of the controversy over the first cause of action.

I am perhaps bound to point out, although the defendant has not done so, that, if the jurisdiction as to the first cause were to fail, the controversy left would involve only $1,731, exclusive of interest and costs (*original paging*, 3, 14–17), being less than $2,000, the limit of amount prescribed in the Act of 1887.

IV.

PLAINTIFF WAS ENTITLED, ESPECIALLY AS HE WAS BROUGHT INTO THE CIRCUIT COURT INVOLUNTARILY, TO RELY UPON THE LAW AS STATED BY THIS COURT IN *Bushnell* v. *Kennedy* AND *Ambler* v. *Eppinger*.

When in October, 1891, by the act of the defendant and the order of the Circuit Court, the plaintiff found himself in the latter court, the law as stated in *Bushnell* v. *Kennedy* in 1869 was that the restriction against jurisdiction in case of assigned causes of action was a privilege of the defendant which it could waive; and the law as stated in 1890 in *Ambler* v. *Eppinger* was that the *choses in actions* within its restriction, were those having contents like promissory notes. The plaintiff has been put to most serious expense and delay by the litigation in the Federal Court. Jurisdiction should now be denied only under the clearest constraint of law.

The defendant refused any adjustment of the principal claim in suit for nearly three years after it accrued. Then to induce the plaintiff's assignors not to sue, it promised to abide by the decision of arbitrators, the Hon. Charles S. Fairchild, lately Secretary of the Treasury, being the umpire. Having secured more than a year's delay by that device, it revoked the arbitration on the eve of a decision. The plaintiff then sued in the State Court, as, without any doubt, he had the right to do. The defendant then compelled him to litigate for three years and a half in the Circuit Court—apparently hoping in due time to escape decision there as it had escaped decision in the arbitration tribunal.

V.

IT IS SUBMITTED THAT BOTH QUESTIONS CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

NEW YORK, 28th January, 1895.

EDWARD M. SHEPARD,
of Counsel for Davidson.

FILED.
FEB 2 1895
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

THE MEXICAN NATIONAL RAILROAD COMPANY,
Plaintiff in Error,

versus

JOSEPH A. DAVIDSON,
Defendant in Error,

No. 880.

JOSEPH A. DAVIDSON,
Plaintiff in Error,

versus

THE MEXICAN NATIONAL RAILROAD COMPANY,
Defendant in Error.

No. 876.

REPLY TO BRIEF FOR THE RAILROAD COMPANY.

EDWARD M. SHEPARD,
Of Counsel for DAVIDSON.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE MEXICAN NATIONAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DAVIDSON, DEFENDANT IN ERROR.

No. 880.

AND

JOSEPH A. DAVIDSON, PLAINTIFF IN ERROR,

vs.

THE MEXICAN NATIONAL RAILROAD COMPANY, DEFENDANT IN ERROR.

Reply to Mr. Cleveland's Brief for the Railroad Company.

I.

The statement of the learned counsel as to the $40,000 is not, I submit, proper. The matter is not in the record before this Court, and is not correctly and fully stated by the counsel. The promissory notes to which he refers were not notes of the defendant; nor was the defendant an endorser or in any way a party to them; nor were they sued on. Their amounts were merely items of the debt of the Mexican National Rail*way* Company. The defendant, the Rail*road* Company, is sued upon an independent obligation of its own, implied in and created by its acceptance of the Railroad offered it under the Matheson-Palmer agreement.

II.

It is submitted that the inference drawn by the learned counsel for the Railroad Company from recent decisions in this Court is not justified.

Plant Investment Co. v. *Railway Co.*, 152 U. S., 71: The suit was originally brought in the Federal Court of the United States, where the defendant objected to jurisdiction. The cause was brought when the Act of 1875 (section 629 of the Revised Statutes) was in force. The decision is not in point on the questions under the Act of 1887 which are here presented.

New Orleans v. *Benjamin*, 153 U. S., 411: This cause also was originally brought in the Federal Court, where the defendant objected to jurisdiction.

Tennessee v. *Union Bank*, 152 U. S., 454: The question was whether the plaintiff's declaration or bill showed jurisdiction within the original grant of jurisdiction contained in the early part of the 1st section of the Act of 1887. Jurisdiction was claimed on the ground that a constitutional question was involved.

In none of these cases was the question decided whether the expression in the 2d section of the Act of 1887, limiting the right of removal to causes of which the circuit courts are GIVEN jurisdiction by the 1st section, can be made applicable to the negative restrictions in the latter part of the 1st section.

III.

Nor do the decisions cited by the learned counsel in the Circuit Courts bear out his contention:

McNulty v. *Connecticut Co.*, 46 Fed. Rep., 305: The decision of Judge SHIRAS, the District Judge of the Northern District of Iowa, was rendered upon a motion promptly made by the plaintiff in the Circuit Court to remand the cause.

Bentlif v. *London Co.*, 44 Fed. Rep., 667: This cause involved only the question whether, the cause having been removed from the State court, the plaintiff could sustain his suit, if there were no jurisdiction in the State court. The criticism of Judge WALLACE upon the language of this Court in *Bushnell* v. *Kennedy* (9 Wall. 387) and of the Circuit Court in *Sayles* v. *Insurance Co.* (2 Curtis, 212), related only to this question.

IV.

A perusal of the exhaustive brief for the Railroad Company leaves one point at least distinctly impressed upon the mind. That is, that the discussion has strayed far from what, after all, is the real question which this Court, unless prevented from ever actually reaching it by the maze of conflicting utterances, is to answer: *What was the intention of the law-makers in enacting the special provision under consideration?*

That by itself would seem not difficult of determination. Having conferred jurisdiction upon the circuit courts generally of all causes between parties of diverse citizenship, Congress proceeded to make certain regulations in order to prevent the oppressive exercise of it by suitors against defendants in those courts.

First, a defendant is protected from arrest in civil suits out of the district in which the suit is pending. *Secondly*, he is protected from being sued at all except in one of two districts, those in which either he or the plaintiff resides. *Thirdly*, he is protected, save in some excepted instances, from being sued even in those districts, if the plaintiff sue merely as an assignee of a fellow citizen of the same state.

On their face these regulations are all alike merely for the protection of the defendant from an abuse of

the general jurisdiction conferred upon the courts. It never entered the mind of Congress that a person properly sued in a State court, could remove the action into a Federal court, and thereafter object to proceeding with the suit in that court on the ground that neither he nor the plaintiff was a resident of the district. The courts have declared accordingly that he waived the protection which the act gave him the right to insist upon, when he himself brought the action into the Federal court. Nor did it ever enter the mind of Congress that a person properly sued in a State court, could remove the action into the Federal court, and then object to proceeding with it in that court on the ground that the cause of action had once belonged to a person who could only have sued upon it in the State court. And here also, therefore, the courts should declare that he waives this immunity from suit upon this cause of action except in the State court, when, being already in the State court, he himself removes the suit from it to the Federal Court.

In neither case is there any question of absolute jurisdiction. The jurisdictional fact,—the diversity of citizenship,—existing, jurisdiction has been already conferred. The very making of this regulation upon its exercise is the declaration that the jurisdiction itself exists. The regulation was indispensable, and its purpose unmistakable, to prevent assignments of causes of action *for the purpose* of conferring jurisdiction upon Federal courts.—The bringing of this action in the State court itself conclusively negatived the existence of the fact to which the regulation was intended to apply. The defendant did not need the protection of the regulation, for there had been no attempt to sue him in a Federal court. He himself creates the situation from which Congress designed to protect him only when it was the work of his adversary. Congress gives him a shield which he

would turn into a two-edged sword, and his learned brief is but an attempt to persuade this Court that it is bound to assist him in his purpose by the language of decisions given upon states of fact totally dissimilar.

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